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No. 97-1802

In The

Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

MICHAEL J. LIGHTFOOT*
STEPHEN B. SADOWSKY
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT, VANDEVELDE SADOWSKY, MEDVENE & LEVINE
655 South Hope Street,
Thirteenth Floor
Los Angeles, California 90017-3211
Telephone: (213) 622-4750

Attorneys for Respondent Paul L. Gabbert

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. THE RESPONDENT LAWYER REPRESENTED A CLIENT SUBPOENAED TO TESTIFY BEFORE AND PRODUCE INCRIMINATING DOCUMENTS TO A GRAND JURY INVESTIGATING THE CLIENT AS ITS TARGET. THE PETITIONER PROSECUTORS, INTENDING TO GET AN UNFAIR ADVANTAGE OVER THE CLIENT, UNNECESSARILY AND INTENTIONALLY PRECLUDED THE RESPONDENT FROM GIVING HER ADVICE AND COUNSEL AFTER SHE HAD BEEN ALLOWED TO LEAVE THE GRAND JURY ROOM TO DO SO (FOLLOWING QUESTIONING BY THE PETITIONERS). DID THIS CONDUCT VIOLATE THE RESPONDENT'S DUE PROCESS RIGHTS TO GIVE ADVICE TO HIS CLIENT IN THE PRACTICE OF HIS PROFESSION?

2. WERE RESPONDENT'S DUE PROCESS RIGHTS TO GIVE ADVICE TO HIS CLIENT IN THE PRACTICE OF HIS PROFESSION, WHILE HIS CLIENT WAS APPEARING AS A WITNESS BEFORE A GRAND JURY INVESTIGATING THE CLIENT AS ITS TARGET, CLEARLY ESTABLISHED IN MARCH OF 1994?

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STATEMENT OF THE CASE

A. INTRODUCTION

This case involves a criminal defense lawyer who represented a grand jury witness, a young woman who was a target of a grand jury investigation and who retained the lawyer for representation in that matter, and two local prosecutors who, intent on gaining an advantage over the young woman, prevented her from obtaining advice from her lawyer so that they could more readily obtain incriminating evidence, testimony, and documents from her. The core issue is a narrow one: Does a lawyer who has been hired to represent a client who is the target of a grand jury perjury investigation have a right to give advice to that client (sought outside the grand jury room) free from unnecessary interference by the investigating prosecutors. The rule Respondent seeks from this Court is equally narrow: that the Due Process Clause protects the ability of a lawyer to provide advice and counsel to a client who is a target of a grand jury investigation free from unnecessary interference by prosecutors whose intention was to take advantage of the uncounselled client in order to obtain incriminating evidence.

B. STATEMENT OF PROCEEDINGS

Paul L. Gabbert ("Gabbert"), a criminal defense lawyer, filed a civil rights suit under 42 U.S.C. § 1983. Gabbert's claims arose out of his representation of Traci Baker ("Baker"), a young waitress who had become a "target"[1] of a high-profile, grand jury investigation and who had been subpoenaed to produce testimony and documents

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[1] The Department of Justice defines a "target" as "a person to whom the prosecution or grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." 7 Dept. of Justice Manual § 9-11.150 (1992-1 Supp.).

before that very same grand jury. The complaint detailed an extended course of conduct by which two Los Angeles Deputy District Attorneys, Petitioners David Conn ("Conn") and Carol Najera ("Najera"), through their direction and oversight of the actions of others as well as their own direct participation, intruded into, interfered with, and obstructed the attorney-client relationship between Gabbert and Baker. As alleged, the conduct of which Gabbert complained culminated in the execution of a search warrant for Gabbert's person which the two prosecutors had deliberately timed to coincide with Baker's appearance before the grand jury; the prosecutors' objectives were to separate Gabbert and Baker and to prevent Gabbert from providing any meaningful legal counsel to his client. It was alleged that the two prosecutors acted intentionally in order to obtain an advantage over the unsophisticated Baker and to elicit incriminating testimony from her.

Gabbert pleaded two claims for relief. The first alleged violations of the Fourth Amendment. (1 J.A. 22.) The bases for this claim were, among others, that the first search of Gabbert was conducted by a "special master," Elliot Oppenheim ("Oppenheim"), pursuant to a warrant that was unreasonably broad and had been issued on the basis of an affidavit that contained material misstatements and omissions of fact. (1 J.A. 22-23.)[2] The Fourth Amendment claim was also based on the fact that a second search of Gabbert, conducted by Petitioner Conn and Beverly Hills Police Department Detective Leslie Zoeller ("Zoeller"), was warrantless. (1 J.A. 22.) The second cause of action alleged a violation of the Fourteenth Amendment, asserting, among other things, that Conn and Najera violated Gabbert's substantive due process rights by arbitrarily and unlawfully interfering with his rights to communicate with and counsel his client. (1 J.A.

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[2] *See* notes 7 and 8, *infra*, and accompanying text.

24-25.) Gabbert's substantive due process claim was predicated on the entire course of conduct undertaken by the two prosecutors in their investigation of Baker and their intentional interference with Gabbert's representation of Baker. (1 J.A. 24-26.) That conduct included: 1) the prosecutors' questioning of Baker at her home, knowing that she was represented by counsel and that he was not present; 2) the failure to follow lawful procedures when searching Gabbert; and 3) the execution of the warrant in a manner designed to separate Gabbert from Baker. (1 J.A. 25-26.) As alleged in the complaint, it was the totality of the prosecutors' conduct, including the unlawfulness of the search itself, that effected the violation of Gabbert's constitutional rights.[3]

The district court dismissed Gabbert's Fourth Amendment claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The court denied the defendants' motion to dismiss as to the substantive due process claim, determining, however, that the only aspect of the prosecutors' conduct which stated a

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[3] Amicus for Petitioners argues erroneously that, pursuant to *Albright v. Oliver*, 510 U.S. 266 (1994), Gabbert's second claim should have been brought under the Fourth Amendment, not the Fourteenth Amendment. To begin with, Gabbert's lawsuit is predicated on violations of both the Fourth and Fourteenth Amendments. (1 J.A. 22, 24.) Moreover, where as here, the wrongful conduct implicates more than one constitutional provision, the plaintiff is not required to choose between constitutional theories. As this Court has stated, "[c]ertain wrongs can affect more than a single right, and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County, Il.*, 506 U.S. 56, 70 (1992). In such a situation, the "proper question is not which Amendment controls but whether either Amendment has been violated." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993) (acknowledging that the Fourth Amendment is not the "beginning and end of constitutional inquiry whenever a seizure occurs").

constitutional violation was the claim that the timing of the execution of the warrant interfered with Gabbert's right and ability to practice his profession. (App. B to Pet. for Writ of Cert., p. 18.) Subsequently, the court granted summary judgment with respect to this claim on qualified immunity grounds. (App. D to Pet. for Writ of Cert., p. 11.)

The Ninth Circuit reversed in part, holding that Gabbert had alleged a violation of a clearly established substantive due process right: local prosecutors violate an attorney's Fourteenth Amendment right when they unduly and unreasonably interfere with the attorney's right to practice his profession by preventing the attorney from providing meaningful and timely legal assistance to the client in the very matter and at the very moment for which the lawyer was retained. The unreasonable interference, according to the court, was the prosecutors' deliberate conduct which was intended to, and did, prevent Gabbert from communicating and consulting with his client. The Court further held that Conn[4] and Zoeller[5] had violated Gabbert's Fourth Amendment rights in conducting the second search. (App. A to Pet. for Writ of Cert., pp. 23-24.)

C. STATEMENT OF FACTS[6]

At issue in this case is what ordinarily would be seen as a commonplace, but important, occurrence in the daily

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[4] The Fourth Amendment claim as to Conn has not been challenged by Petitioners in this Court. It remains pending in the district court.

[5] Detective Zoeller was initially a defendant in the civil rights action. Gabbert and Zoeller entered into a settlement agreement and Zoeller was dismissed from the lawsuit on June 23, 1998. (Cent. Dist. Docket Entry No. 78.)

[6] The contours of the "facts" of this case, given its procedural posture, are shaped in substantial part by well-

routine of an experienced criminal defense attorney: the representation of a target of an ongoing grand jury

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recognized rules governing appellate review. As noted above, some of Respondent's claims were dismissed by the district court upon Petitioners' 12(b)(6) motion for failure to state a claim upon which relief may be granted, while others were the subject of summary judgment entered by the district court in favor of Petitioners. As to the dismissed claims, on review, the court and the parties are to presume all factual allegations of the complaint to be true and to draw all reasonable inferences in favor of the non-moving party (here, Respondent). *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (CA9 1987). Since Petitioners' summary judgment motion below was granted, Respondent's evidence (that is, the evidence of the non-moving party) is to be believed; Respondent's version of any disputed issue of fact is presumed correct; and all justifiable inferences are to be drawn in Respondent's favor. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 457 (1992); *see also Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

Petitioners ignore these well-established strictures and, in their brief, with nary a citation to the record, present a self-serving version of the "facts" which is styled as a "summary of the evidence." *See* Pet'r Br., pp. 4-8. Petitioners' so-called evidentiary summary can be fairly characterized as their contentions of fact and should not be confused with the "facts." Particularly disturbing is Petitioners' repeated, and highly misleading, reference to Petitioners' purported mental states after they had successfully separated Gabbert from his client. *See, e.g.*, Pet'r Br. at p.7 ("the prosecutors were led to believe that she had consulted with Respondent;" " . . . which further led the Petitioners to believe that she had consulted with Respondent;" and "[t]his response convinced the prosecutors that she had consulted with Respondent") and p.8 ("Traci Baker's last response further assured the prosecutors that she had once again consulted with Respondent"). Again, not a single citation to the record is given. In truth, Petitioners' factual assertions find no support in the complaint's allegations; were not included within the facts offered by Respondent, the non-moving party below; and cannot be justifiably or reasonably

investigation who, without immunity, has been compelled, by subpoena, to appear before a local grand jury to testify and to produce incriminating documentary evidence. The respective roles, duties, obligations, and rights of the prosecutors, government investigators, defense counsel, and the witness or target of the inquiry, in this context, are well-settled. The factual setting presented here, however, is anything but ordinary. The sensational historical context in which this case arises – the murder trial of Erik and Lyle Menendez – is, of course, fortuitous. By contrast, the calculated, deliberate efforts undertaken to thwart defense counsel's ability to discharge his professional obligations to his client by two Los Angeles prosecutors are not. Nonetheless, the application of clearly established constitutional rules – even in this aberrant setting – remain constant.

This matter arises out of Respondent Paul L. Gabbert's representation of Traci Baker, a young waitress who had been called as a defense witness in the high-profile murder trial of Erik and Lyle Menendez. The first Menendez trial resulted in a hung jury. After that trial, Petitioners David Conn and Carol Najera, both Los Angeles County Deputy District Attorneys, newly assigned to retry the case, received information that Baker was in possession of a letter, written to her by her former boyfriend, Lyle Menendez. Petitioners believed that, in this letter, Menendez instructed Baker to testify falsely at his trial. As the following events reveal, Conn and Najera

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inferred from any of Respondent's facts. At the least, Petitioners' factual assertions should have been clearly labeled as "contentions." Given the procedural posture of the case, Petitioners' contentions are of no relevance to any issues under review in this Court. Of course, upon a trial below (where the Fourth Amendment claim is pending), it will be for the jury to determine which contentions are indeed facts.

were determined, by whatever means available, to obtain this letter and to "win" the second trial of Erik and Lyle Menendez. *See* Steve Proffitt, *Gilbert Garcetti: In Hot Seat as L.A. District Attorney*, L.A. Times, March 13, 1994, at M3; Ted Rohrlich, *High Profile Losses Tarnish Reputation of District Attorney's Office: Prosecutors Win Most Cases, But Failures Like Menendez & McMartin Invite Criticism of Tactics*, L.A. Times, March 6, 1994, at A1.

Baker retained Gabbert in early February of 1994 to represent her in connection with the District Attorneys' investigation regarding her testimony in the first trial. (1 J.A. 9 ¶ 15.) Shortly thereafter, Gabbert was contacted by Leslie Zoeller, a Beverly Hills Police Department Detective, who indicated that he and the District Attorney's office sought Baker's cooperation in the anticipated retrial of Lyle Menendez. Subsequent to his initial contact with Zoeller, Gabbert received additional telephone calls from the detective regarding Baker's participation in the Menendez investigation. (1 J.A. 10 ¶ 16.)

Between approximately February and March 15, 1994, Gabbert also received several telephone calls from Conn. (1 J.A. 10 ¶ 17; Appendix G, pp. 2-3; Appendix E, pp. 3-5.) Conn understood that Gabbert had been retained to represent Baker in connection with the Menendez investigation. (1 J.A. 10 ¶ 17; Appendix G, pp. 2-3; Appendix E, pp. 2-3.) During one of these telephone conversations, Conn advised Gabbert that Baker was a "target" of the grand jury investigation and asked Gabbert if she would voluntarily cooperate in the investigation. When Gabbert indicated that he could not respond to his question at that time, Conn requested that Gabbert make Baker available for the service of a grand jury subpoena. It was agreed that Zoeller would serve the subpoena at Gabbert's law office on March 17 at 12:00 noon. (1 J.A. 10 ¶ 17; Appendix E, pp. 3-5.)

Subsequent to, and despite, the agreement with respect to service of the subpoena, in approximately the third week of February, Zoeller and another Beverly Hills

Police Department officer, Stephanie Miller, appeared unannounced at Baker's home at approximately 8:30 p.m. Although Zoeller knew Baker was represented by Gabbert and that he was not present, Zoeller attempted to question Baker about "the letter." (1 J.A. 11 ¶ 18; Appendix D, pp. 10-11.) Having failed in his attempt to obtain "new" information directly from Baker, Zoeller appeared at Gabbert's office to serve Gabbert with the grand jury subpoena for Baker. (1 J.A. 11 ¶ 19; Appendix G, pp. 3-5.) The subpoena commanded Baker's appearance before the grand jury on March 21 and also ordered her to produce any correspondence between Lyle Menendez and her. (1 J.A. 11 ¶ 20; 1 J.A. 31.) Because the subpoena's request for the production of documents potentially implicated Baker's Fifth Amendment right against compulsory self-incrimination, Gabbert immediately began to prepare a motion to quash the subpoena. (*Id.*)

On Friday morning, March 18, Gabbert telephoned Conn and advised him of the constitutional basis for the motion to quash and requested that Conn continue Baker's grand jury appearance one week so that the motion could be litigated fully and fairly prior to Baker's grand jury appearance. Conn refused. (1 J.A. 11-12 ¶ 21; Appendix E, pp. 5-7.) Gabbert also asked Conn if he would stipulate to the issuance of an order shortening time so that the motion could be heard prior to Baker's appearance on the following Monday. Conn refused this request as well. (1 J.A. 12 ¶ 22; Appendix E, pp. 5-7.) That afternoon, Gabbert attempted to file the motion to quash with the Los Angeles Superior Court. His *ex parte* application for an order shortening time was denied and the Court declined to accept the motion for filing. (1 J.A. 12 ¶ 23.)

At approximately 8:15 on the evening of Friday, March 18, aware that Gabbert had been unable to file the motion to quash and that Baker would therefore be appearing before the grand jury on the following Monday, Conn, Najera, Zoeller and Miller appeared at Baker's

home in Orange County with a search warrant for all correspondence between Baker and Menendez, as well as any other evidence which would establish a relationship between Baker and Menendez. (1 J.A. 12 ¶ 24; 1 J.A. 34, 48; Appendix D, pp. 2-5; Appendix J, pp. 2-5.)

Upon the arrival of the prosecutors and police at her home, Baker attempted to contact Gabbert by telephone to seek his assistance. (1 J.A. 13 ¶ 26.) She was not able to reach him. Despite the fact that they were aware that Baker was a target of a criminal investigation, that she was represented by counsel, and that she desired to speak with counsel, but was unable to, Conn, Najera and Zoeller also attempted to elicit statements from Baker regarding the correspondence they sought. (1 J.A. 13 ¶ 26; Appendix J, pp. 5-8.) Conn also asked Baker several questions about her relationship with Gabbert. (1 J.A. 13 ¶ 26; Appendix D, pp. 8-9.) Conn and Najera, assisted by Zoeller and Miller, personally searched Baker's home for approximately one and one-half hours, seizing, among other things, correspondence from Baker's former attorney and a typed report of an interview of Baker by that attorney. (1 J.A. 12-13 ¶¶ 24-25; 1 J.A. 48-49; Appendix D, pp. 5-8; Appendix J, pp. 4-6.) The letter was not found. On the Monday morning of Baker's grand jury appearance, Conn and Najera redoubled their efforts to obtain it and other information from Baker.

At 8:30 a.m. on Monday morning, March 21, Baker, accompanied by Gabbert, checked in with the grand jury bailiff for her scheduled appearance. (1 J.A. 14 ¶ 28; 2 J.A. 368, 425-426.) Waiting in the hallway outside the grand jury room, Gabbert and Baker were approached by Conn and Najera who proceeded to engage Gabbert in a discussion regarding a possible grant of immunity for Baker which would have allowed her to testify free of the risk that her testimony could be used to prosecute her. The four went to Conn's office, purportedly to discuss further the prospect of a grant of immunity. (1 J.A. 14-15

¶¶ 29-30; 2 J.A. 457-459, 427-431.) Based on his conversations with Conn and Najera that morning, Gabbert believed that Conn would prepare a draft letter of immunity for Baker. (1 J.A. 15 ¶ 31; 2 J.A. 430-431.)

Gabbert and Baker returned to the grand jury area to wait for Conn and Najera to bring the immunity letter. (1 J.A. 15 ¶¶ 32-33; 2 J.A. 432-433.) However, instead of preparing the letter, as Conn had led Gabbert to believe, Conn and Najera had applied for and obtained search warrants for the person and effects of both Gabbert and Baker. (1 J.A. 16 ¶ 34(b); 3 J.A. 495-499.) In fact, unknown to Gabbert and Baker, Conn had already decided to obtain the warrants at the time they were in his office discussing the immunity issue and had planned that the warrant for Gabbert would be executed as Baker was summoned into the grand jury room to commence her scheduled testimony. (3 J.A. 492, 495-497.)

While obtaining the warrant for Gabbert, the prosecutors also selected a special master, Elliot Oppenheim,[7] to execute the warrant on Gabbert, as required by California law.[8] (1 J.A. 16-17 ¶¶ 34-35; Appendix E, pp. 8-9.) The

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[7] The special master selected, Elliot Oppenheim, had virtually no experience in criminal matters. A solo practitioner his entire career he had recently retired after approximately 55 years of practice. The last criminal case he handled was a misdemeanor in approximately 1939. (3 J.A. 572-573.) Prior to searching Gabbert, he had conducted two searches as a special master in the preceding ten years – both on doctors' offices. (Appendix I, pp. 2-4.)

[8] Pursuant to California Penal Code § 1524, a special master is required for the search of a non-target attorney. That statute contains strict, mandatory safeguards. Section 1524(c)(1) provides that at the time of "service of the warrant, the special master shall inform the party served of the specific items being sought and [ ] the party shall have the opportunity to provide the items requested." Section 1524(c)(2) provides that, if an attorney served with a warrant states that an "item or items

prosecutors gave no instruction to Oppenheim as to the mandatory procedures for searching an attorney under California law and Oppenheim had no independent knowledge of the statutory requirements. (Pet'r Br., p.21 n.5; Appendix I, pp. 5-7.) Indeed, Oppenheim believed, quite erroneously, that his only obligation as a special master under the statutory scheme in question was to advise the person being searched of his Fifth Amendment right against self-incrimination and the prosecutors did not disabuse him of that notion. (Appendix I, pp. 5-7; Appendix E, pp. 16-19; Pet'r Br., p.21 n.5.)

Upon returning to the grand jury area, Conn and Najera stood by and watched Detective Zoeller serve Gabbert with the warrant. They also watched as Oppenheim took Gabbert into a separate room to begin the search. (1 J.A. 16 ¶ 34(c); 1 J.A. 17 ¶ 36.) As that search was in progress, which necessarily caused Gabbert to be removed and separated from his client, Conn and Najera entered the grand jury room; shortly thereafter Baker was called as a witness. (1 J.A. 17 ¶¶ 36-37.)

As Oppenheim began to search Gabbert's briefcase and files, Gabbert repeatedly objected on the grounds that his belongings contained attorney work-product and attorney-client privileged information. (1 J.A. 18 ¶ 39; 2 J.A. 436; Appendix G, pp. 10-12.) Moreover, he produced to Oppenheim the only materials in his possession that were arguably within the scope of the warrant – two pages of a three-page letter to Baker from Menendez. (1

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should not be disclosed, they shall be sealed by the special master and taken to court for a hearing." Section 1524(e) further provides that a special master may permit the party serving the warrant (here Detective Zoeller) to accompany the special master as he or she conducts the search. However, that party "shall not participate in the search nor shall he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served."

J.A. 18 ¶¶ 39-40; 2 J.A. 436.) Pursuant to the explicit terms of section 1524(c)(1) of the California Penal Code, the search should have terminated once Gabbert produced this item. Oppenheim ignored Gabbert's objections and searched through the following items:

a) an attorney-client correspondence and document file as to Baker, including several pages of handwritten notes of Gabbert's interview of this client;
b) two files of other clients containing privileged attorney-client and work-product materials;
c) Gabbert's calendar, containing extensive handwritten entries and notes including a list of past and present client names, addresses, and telephone numbers, as well as personal information;
d) a leather pocketbook/wallet;
e) a Dictaphone;
f) an eye glass case; and
g) a tablet of paper containing, among other things, a list of "things to do" and a list of client names and corresponding information which revealed the client's billing status.

(1 J.A. 18-19 ¶¶ 39-41; 2 J.A. 346-347, 436.) Although Gabbert continued to object on privilege grounds, Oppenheim unlawfully read the contents of each file, including the notes of Gabbert's interview of Baker. (1 J.A. 18-19 ¶¶ 39-42; 2 J.A. 346-347, 436; Appendix G, pp. 10-12.) Moreover, Oppenheim questioned Gabbert about his fee arrangement with Baker, asked Gabbert for his home address, and crudely commented about personal information he found in Gabbert's calendar which related to Gabbert's fiancé. (1 J.A. 19-20 ¶ 42; Appendix G, pp. 9-10.)

Moments before Zoeller served the warrant on Gabbert, Conn asked Gabbert, in his client's presence,

whether, if a determination to arrest Baker was made, Gabbert would surrender Baker in Los Angeles or whether she would have to be arrested in Orange County. (1 J.A. 15 ¶ 32; 2 J.A. 457-458.) Overhearing this conversation, Baker, already apprehensive due to the inherently intimidating nature of the grand jury, became unnerved. (2 J.A. 457-458.) On the heels of this conversation, she watched as her attorney, surrounded by law enforcement officials, was literally taken away. (2 J.A. 459-460.) She described her state of mind as follows, indicating her belief from the conversation that had just taken place that her arrest might be imminent:

> Mr. Conn made a statement in my presence, would I submit to arrest in the hallway, or would I have to be arrested in Orange County. From that point on, I was super scared because I really thought I was going to be arrested. Then, we're expecting, I think, to have an immunity thing brought down. Instead, suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know what to do. I just know I'm going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I'm stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt.

(2 J.A. 476.)

The first question Najera asked Baker before the grand jury was: "Miss Baker, are you acquainted with the defendant Lyle Menendez?" Baker responded: "At this time, I wasn't able to speak with my attorney. He's still with the special master." She then asked for an additional

opportunity to consult with Gabbert. (3 J.A. 610.) Baker was permitted to leave the room and the two Deputy District Attorneys followed her out. (3 J.A. 611.)

When Baker left the grand jury room, Gabbert was not in the waiting area as Baker had anticipated he would be. (2 J.A. 461.) Baker saw Patti Jo Fairbanks, a legal assistant in the District Attorney's office, and asked for her to help in finding Gabbert. (2 J.A. 461-462; 3 J.A. 580; Appendix F, pp. 2-6.) Fairbanks located Gabbert and Oppenheim in the private room where Gabbert was being searched. (2 J.A. 461-462; 3 J.A. 580.) Gabbert was attempting to prevent the disclosure of attorney-client privileged materials. (1 J.A. 18 ¶ 39; 2 J.A. 436; Appendix G, pp. 10-12.) Even though he had already provided Oppenheim with the only responsive documents in his possession, namely two pages of the three-page letter from Menendez to Baker,[9] Oppenheim nonetheless continued to search Gabbert's files. (1 J.A. 18-19 ¶¶ 39-42; 2 J.A. 436.) Oppenheim read Gabbert's attorney-client privileged file as to Baker and even attempted to photocopy Gabbert's handwritten notes of his interview with Baker. (1 J.A. 18 ¶ 40; 2 J.A. 346-347, 436; Appendix G, pp. 10-12.)

Had Oppenheim followed statutory procedure, the search would have terminated when Gabbert produced the two pages of the Menendez letter. In further violation of section 1524, Oppenheim continued the search after Gabbert invoked the attorney-client privilege. Because Oppenheim failed to follow the law, Gabbert was required to focus on preventing the disclosure of privileged information. He could not simultaneously assist Baker. Thus, when Fairbanks told Gabbert that Baker

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[9] Despite the fact that Gabbert gave to Oppenheim the two-page fragment of the Menendez letter, it does not appear on the search warrant return. (1 J.A. 18 ¶ 39; 1 J.A. 48-49; 2 J.A. 436.)

wanted to speak with him, he informed Fairbanks that, realistically, he could not speak with Baker at that moment. (2 J.A. 438.) When Fairbanks replied that Baker had to return to the grand jury room, Gabbert asked that the proceedings be delayed. As Gabbert testified, "And I said, in effect 'That's tough. They created this situation. They can wait as long as it takes.' " (*Id.*) Unknown to Gabbert, his request was denied and Baker was commanded by the bailiff to return to the grand jury room. (2 J.A. 466-467.)

As she returned, Baker was distressed and upset. Although she had been unable to speak with Gabbert, she guessed that it was appropriate to assert her Fifth Amendment right against compulsory self-incrimination, based on Gabbert's "body language" which she had viewed from the hallway. (2 J.A. 462, 465.) She read the invocation from a prepared card she had brought with her in the event Gabbert advised her to assert her right against self-incrimination in response to a particular question. (2 J.A. 467-468.) She was now in an even greater state of agitation, not knowing whether she had responded appropriately to the previous question and unsure how to respond to the next. (2 J.A. 469.)

Despite the fact that Baker was unable to confer with Gabbert,[10] Najera continued her questioning of Baker.

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[10] Relying on Supreme Court Rule 15.2, *amicus* for Petitioners contends that Gabbert, in opposing the writ petition, did not dispute Petitioners' assertion that the prosecutors did not know Baker had not been able to consult with Gabbert and, as a result, has somehow waived the ability to dispute this fact now. (Br. *Amicus Curiae* in Supp. of Pet'rs, p.3 n.2.) *Amicus* is incorrect.

Rule 15.2 addresses the Court's discretion to ignore newly-asserted or newly-contested facts which, even though relevant on the issue of whether *certiorari* should be granted, are not explicitly addressed until the filing of the briefs on the merits.

Baker again requested an opportunity to confer with her attorney. (2 J.A. 467-469; 3 J.A. 611-612.) Gabbert still was not available, because Oppenheim's search continued.

The rule embodies the general proposition that the Court may choose not to reconsider a grant of *certiorari* on the basis of a factual assertion which was not presented in timely fashion. Here, the purported fact in question – that, allegedly, the two prosecutors did not know that Baker could not consult with Gabbert on the occasions when she was allowed to exit the grand jury room – whether true or false was wholly immaterial on the question of whether *certiorari* should be granted. Even if true, the asserted fact would signify only that the two prosecutors had not known, at that time, of the success or failure of their plan to separate Gabbert and Baker and to prevent Baker from receiving Gabbert's counsel. Thus, Rule 15.2 has no application here.

Moreover, the allegations of Respondent's complaint, the facts offered by him in opposition to the summary judgment motion below, and all the inferences drawn therefrom, as adduced below and as summarized in Respondent's Brief in Opposition to the Petition for a Writ of *Certiorari*, contradict Petitioners' self-serving assertion. Indeed, Respondent contends that Petitioner acted deliberately and intentionally in thwarting Gabbert's efforts to advise and counsel his client. Those allegations, evidence and inferences – all of which are presumed true, *see* n.6, *infra* – include: (1) Petitioners deliberately caused the warrant to be executed on Gabbert's person at the time Baker was entering the grand jury room; (2) Petitioners refused to delay either the search of Gabbert or Baker's appearance, in order to gain an advantage over Baker; (3) at the commencement of Baker's appearance before the grand jury, Baker explicitly stated that her lawyer was unavailable due to the conduct of the search; (4) moments later, when Baker exited the grand jury room for the purpose of conferring with counsel, both prosecutors followed her into the hallway where they should have been able to observe, as did Patti Jo Fairbanks, a legal assistant in Conn's office, that Gabbert was not available for consultation and, in fact, was still being searched; and (5) Oppenheim did not report to Conn that the search had been completed until Baker's third excused departure from the grand jury room.

Baker was ordered back before the grand jury. Not knowing what else to do, she again read from her prepared card. In response to a third question, Baker once more sought leave to confer with her attorney. (2 J.A. 469-470; 3 J.A. 612-613.) Upon leaving the grand jury room on this occasion, Baker was confronted by another person – Detective Zoeller – searching Gabbert. (2 J.A. 470-471.) Because Oppenheim had erroneously advised the prosecutors that Gabbert's files did not contain privileged documents, Conn directed Zoeller to conduct an additional search of Gabbert. (1 J.A. 20 ¶ 44; 2 J.A. 442; 3 J.A. 510-515.) During the break in the grand jury proceedings, Conn joined in this search. (1 J.A. 20-21 ¶¶ 44-45; 2 J.A. 442; 3 J.A. 515-516.)

Shortly thereafter, because Baker had failed to provide the testimony and documents sought by the prosecutors, contempt proceedings were initiated and the grand jury foreperson announced: "Miss Baker, I declare you to be in contempt of this grand jury." (3 J.A. 616.) Baker was taken before the Los Angeles County Superior Court, Florence-Marie Cooper, Judge of the Superior Court presiding, for a hearing on the contempt citation. (3 J.A. 618.) Judge Cooper observed that the grand jury subpoena directed to Baker "raises privilege [issues] and that probably the Fifth Amendment applies and that [Baker] would be entitled to a grant of immunity before she could be compelled to produce these documents." (3 J.A. 640.)[11] Baker was not held in contempt at that time and the hearing was continued.

Subsequently, the prosecutors never executed the search warrant for Baker, (3 J.A. 504) nor did they resume the contempt proceedings.

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[11] Interestingly, Judge Cooper also commented on the fact that Gabbert's practice included representation of numerous grand jury witnesses. As she stated, "that's an unusual specialty, but there you are." (3 J.A. 642.)

SUMMARY OF ARGUMENT

This Court has long recognized that while prosecutors may strike hard blows, those blows must always be fair ones. The conduct of the prosecutors in this instance ran afoul of that standard. They violated the Respondent lawyer's rights under the Fourteenth Amendment by timing the execution of a search warrant to preclude him from advising his client who was testifying before a grand jury.

The defense attorney here was hired to assure, among other things, that his client would not be compelled to be a witness against herself in an investigation where the lawyer and his client had been told that the client was a target. The attorney had been alerted to several incidents where the prosecutors and their agents had made unethical, if not illegal, attempts to get his client to disclose incriminating information in the days and weeks before her grand jury appearance. The prosecutors were cognizant of the client's right to leave the grand jury room after each question was asked and seek the advice of her attorney, the Respondent, before she was obligated to respond to the question. They were also keenly aware that if the Respondent were physically present to counsel the client that he would, whenever appropriate, resist the disclosure of incriminating evidence by invoking privileges. The prosecutors were further aware that if they took steps to make the Respondent unavailable to give advice to his client and compelled her testimony in his absence, that they increased the likelihood that the client, uncounselled and intimidated, would disclose incriminating information and increase their chances of obtaining evidence necessary to indict her. Any such disclosure by the client would have been irreversible.

As the Ninth Circuit found, the prosecutors timed the execution of a search warrant of the Respondent's person

and effects to render him physically unavailable to give such counsel and advice to his client. They so timed the execution of the warrant even though there were several other alternatives available to them which could have allowed for its effective execution while also affording the Respondent the right to provide counsel to his client.

In engaging in such conduct, the Petitioners violated the Respondent's clearly established Fourteenth Amendment liberty right to counsel his client, in the scope and course of the practice of his profession, free from unreasonable governmental interference.

ARGUMENT

I. AN ATTORNEY HAS A CONSTITUTIONAL RIGHT TO PRACTICE HIS PROFESSION FREE FROM GOVERNMENTAL INTERFERENCE

The foregoing facts reveal a case of egregious government misconduct. Furthermore, that conduct occurred at the precise moment in time when a client's need for the assistance of her attorney, specifically the need for advice on whether or not to answer certain questions and turn over documents, was the greatest – when she faced the extraordinary risk of committing an irreversible act which might very well have made the difference in whether she would or would not have been prosecuted. Indeed, at the precise moment when the client was the most vulnerable, the prosecutors physically separated her from her lawyer so that he could not provide the advice that he was hired to provide.

A. IT IS THE DUTY AND OBLIGATION OF AN ATTORNEY TO ADVISE AND COUNSEL A CLIENT WHO HAS BEEN BOTH TARGETED BY AND SUBPOENAED TO TESTIFY BEFORE, AND PRODUCE DOCUMENTS TO, A GRAND JURY

1. Because She Could Have Potentially Incriminated Herself or Otherwise Waived Her Constitutional and Statutory Privileges, Baker Hired a Lawyer to Represent Her in the Grand Jury and She Had a Right to Expect That the Government Would Not Interfere with Her Legal Representation

Fundamentally, the role of all lawyers is to safeguard the interests of those who cannot protect themselves. Describing a lawyer's obligations to his client in 1856, this Court stated: "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, . . . [or] few more anxiously guarded by the law." *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850). One hundred years later, Justice Frankfurter wrote:

> [A]ll the interests of man that are comprised under the constitutional guarantees given to 'life, liberty, and property' are in the professional keeping of lawyers. It is fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' . . . in defense of right and to ward off wrong.

Schware v. Board of Bar Exam'rs of New Mexico, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring); *see also Damron v. Herzog*, 67 F.3d 211, 214 (CA9 1995) (noting the "historical importance of the public trust in the attorney-client relationship").

Because of the longstanding universal recognition that full and meaningful communication between attorneys and clients is essential to the proper functioning of

our justice system, the attorney-client relationship is protected by both common law privileges and the First Amendment. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that because the "broad [ ] public interest[ ] in the observance of law and the administration of justice," is served by attorney-client relationship, communications between an attorney and his client are deemed privileged); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (describing doctor-patient and lawyer-client testimonial privileges as "rooted in the imperative need for trust and confidence. . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); *see also Swidler v. United States*, ___ U.S. ___, 118 S. Ct. 2081, 2084 (1998) (observing significance of attorney-client relationship);[12] *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas J., dissenting) (recognizing an "obvious" First Amendment right of doctor to advise patients); *see generally Rust v. Sullivan*, 500 U.S. 173, 214 (1991) (Blackmun, J.,

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[12] A necessary corollary to a client's right to engage in a confidential, privileged conversation with her attorney, or her right to have counsel present in a particular circumstance, is the attorney's right and obligation to assert those rights on behalf of the client. *See, e.g., Fisher v. United States*, 425 U.S. 391, 402 (1976) (attorney has standing to raise attorney-client privilege on behalf of his client) and *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) (attorney has standing to assert Sixth Amendment rights of client). As lower courts have observed, a lawyer's ability to provide the necessary legal services to his client is "inextricably bound up" with the client's constitutional entitlement to those services. *See Wounded Knee Legal Defense/Offense Comm. v. F.B.I.*, 507 F.2d 1281, 1284 (CA8 1974), citing *Nyberg v. City of Virginia*, 495 F.2d 1342, 1344 (CA8), *cert. denied*, 419 U.S. 891 (1974). Thus, "[t]he vindication of one [right] is consequently dependent upon the vindication of the other." *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975).

dissenting) (noting a physician's "compelling" interest in conveying information to patients).

In addition to the threshold protections and privileges accorded to the attorney-client relationship generally, even greater rights have been accorded to both the attorney and client in the criminal arena because a defendant's liberty (and sometimes life) are at stake. Thus, for example, an accused has a Sixth Amendment right to counsel at all critical stages of proceedings. *Kirby v. Illinois*, 406 U.S. 682, 690-91 (1972); *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (explaining that the right to counsel embodied in the Sixth Amendment is predicated on the notion that assistance of counsel in criminal cases is essential to our adversary system of criminal justice.) While an explicit textual basis for the right to counsel in a criminal case is found in the Sixth Amendment, that right is also incorporated in the concept of due process of law. *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Gideon*, 372 U.S. at 342-43. As this Court affirmed in *Alvord v. Wainwright*, 469 U.S. 956, 961 (1984), the Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." 469 U.S. at 961, quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938); *see also United States v. Flanagan*, 679 F.2d 1072, 1075 (CA3 1982), *rev'd on other grounds*, 465 U.S. 259 (1984) (noting that defendant's decision to select attorney is protected by Sixth Amendment and Fifth Amendment due process clause).

Perhaps the single most important function a lawyer serves for a client facing potential criminal prosecution is to prevent the client from becoming a witness against himself, i.e., unknowingly waiving his Fifth Amendment right against self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). The potential costs to an accused who is unaware of this

right, or unwittingly waives it, are myriad: the ignominy of being charged or arrested, the expense and psychological trauma of trial, conviction, sentencing, incarceration and, in some instances, loss of life. However, an attorney's ability to fulfill this significant function is necessarily dependent upon his ability to communicate and consult with his client. *See, e.g., United States v. Tucker*, 716 F.2d 576, 581 (CA9 1983) (noting that adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant); *Coles v. Peyton*, 389 F.2d 224, 225-26 (CA4), *cert. denied*, 393 U.S. 849 (1968). If a lawyer is prevented from speaking with and advising his client as to her constitutional rights, the client may as well not have the rights at all. They only protect her if she has the knowledge and guidance required to effectively exercise them. This principle is particularly applicable where circumstances such as fear and intimidation, such as existed here, attend the questioning of the client.

2. The Guidance of a Lawyer at The Grand Jury Stage Is Critical Because the Client's Liberty Is at Stake

We have set out in some detail the perils faced by Gabbert's client on the morning of March 21 in order to allow a full appreciation of the rights he was prepared to defend on that occasion. We stress, however, that this is not a lawsuit filed on the client's behalf; we do not pursue relief on any claims she may have had. We simply believe that it is essential to fully appreciate her predicament in order to understand what the Petitioners prevented Gabbert from doing.

Nor is it our contention that the client had a constitutional right to have counsel present with her physically when she testified before the grand jury. In fact, we recognize that the federal courts and many states do not

allow counsel in the room.[13] But that fact is of no moment to our constitutional claim. For, what is significant is that the Los Angeles District Attorney's office had at the time (and still has) a practice, followed by the Petitioners here, of allowing the witness the right to leave the room and receive legal advice before answering a question. (*See* Appendix C.) This is the same practice that exists in the federal system, one which guards against the inherent dangers and potential prejudice faced by all witnesses. *In re Grand Jury Subpoena*, 97 F.3d 1090, 1093 (CA8 1996) ; *United States v. Plache*, 913 F.2d 1375, 1380 (CA9 1990); *United States v. Schwimmer*, 882 F.2d 22, 27 (CA2 1989); *In re Grand Jury Subpoena*, 859 F.2d 1021, 1024 (CA1 1988); *In re Special Grand Jury*, 676 F.2d 1005, 1010 (CA4 1982); *United States v. George*, 444 F.2d 310, 315 (CA6 1971).[14] And while this Court has never squarely addressed the issue of whether a grand jury target should have a right to counsel in order to prevent potential violations of a witness' Fifth Amendment rights, this Court has implicitly acknowledged the right of a witness to consult with counsel during the course of her testimony. *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

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[13] In contrast to federal practice, twenty states permit counsel to be present in the grand jury room. Some states, such as Arizona, Indiana, Louisiana and New Mexico, only permit counsel in the grand jury room if the witness is a target; others, such as Kansas, permit the attorney to ask questions; and still others, such as New York, even provide court appointed counsel to the witness. (*See* Appendix A.)

[14] One reason federal courts have not thought it necessary to permit counsel in the room is the assumption that a witness will have unfettered access to counsel outside the room and thereby sufficient protection of the witness' constitutional rights. *See, e.g., United States v. Levinson*, 405 F.2d 971, 980 (CA6 1968).

The characterization of the client's right to her lawyer's counsel outside the grand jury as constitutional or otherwise is of no importance here. What is important is that she was accorded that privilege. The state cannot accord a right and then arbitrarily take it away. *See Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894 (1967) (observing that "[o]ne may not have constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.")

The perils faced by a grand jury witness render the guidance of a lawyer crucial. At minimum, legal assistance is necessary because a layman is not aware of "the precise scope, the nuances, and boundaries" of the testimonial privileges at issue, *Maness v. Meyers*, 419 U.S. 449, 466 (1975), or how easily a privilege may be unwittingly waived. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 236 (1973); *see also Coleman v. Alabama*, 399 U.S. 25, 25 (1970) (Burger, J., dissenting) (arguing that grand jury a more "critical" stage than preliminary hearing); *United States v. Levinson*, 405 F.2d 971, 986 (CA6 1968) (counsel should be present at grand jury to protect the witness "from abuse of power of a prosecutor or from a violation of constitutional rights."); *Hawkins v. Superior Court*, 22 Cal. 3d 584, 589, 150 Cal. Rptr. 435, 586 P.2d 916 (1978) (observing the irony that grand jury is captive of prosecutor, yet greater rights under California law attach at preliminary hearing). Moreover, although not yet formally charged, the grand jury witness is nonetheless "faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." *In re Special Grand Jury*, 676 F.2d 1005, 1010 (CA4 1982), quoting *Kirby v. Illinois*, 406 U.S. at 689.

Indeed, in practical terms there is no meaningful distinction between interrogation of a suspect in custody at a station house and the questioning of a grand jury witness. The grand jury witness has as much a right to

invoke privileges and, in reality, is as much in "custody" as the arrestee because he or she is compelled by subpoena to appear, is obligated by law to answer questions under threat of contempt, and may not leave the grand jury proceedings unless excused. In that sense, the grand jury witness is no more free to leave than the suspect who is "held" by law enforcement and entitled to *Miranda* warnings before questioning. Certainly, as California and federal practice assumes, it makes equal sense to allow the grand jury witness the same right and ability to freely consult with her attorney. As the Fourth Circuit concluded, in language applicable to this case:

> [E]ven though [a] witness does not have the right to have counsel appointed for him, he has a substantial interest in continuing to receive the assistance of counsel he has already retained for purposes of the grand jury investigation. The interests in maintaining a proper attorney-client relationship and protecting the confidences of that relationship are similar to the sixth amendment right to effective assistance of counsel and fundamental to our adversarial system of justice.

In re Special Grand Jury, 676 F.2d 1005, 1010 (CA4 1982). Here, Baker retained Gabbert to steer her through the unfamiliar and precarious territory of a grand jury proceeding. As she testified, Gabbert was the "rock" to which she was anchored. She relied on Gabbert's knowledge, judgment and training to protect and preserve her fundamental rights. However, as detailed below, the government's deliberate, unnecessary actions prevented Gabbert from providing her with the advice and counsel she hired him to provide.

B. GABBERT HAD A FUNDAMENTAL RIGHT TO ADVISE AND COUNSEL HIS CLIENT

This Court has repeatedly emphasized that the "touchstone of due process is protection of the individual against arbitrary action of the government." *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1716 (1998), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). For over a century, this Court has also held that the substantive component of the Due Process Clause protects an individual's liberty right to practice his profession free from arbitrary governmental interference. *See Schware v. Board of Bar Exam'rs of N.M.*, 353 U.S. 232, 238-39 (1957) ("A state cannot exclude a person from the practice of law or from any other occupation . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [Fourteenth Amendment concept of 'liberty'] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life."); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); *Dent v. State of West Virginia*, 129 U.S. 114, 121 (1889) ("It is undoubtedly the right of every citizen of the United States to follow any lawful calling."); *see also Leis v. Flynt*, 439 U.S. 438, 445 (1979) (Stevens, J., dissenting) ("A lawyer's interest in pursuing his calling is protected by the Due Process Clause of Fourteenth Amendment.")[15]

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[15] Substantially all of the cases relied on by petitioners for the proposition that, in order to state an actionable due process claim, Gabbert must be entirely excluded from his profession,

While the constitutional right at issue is framed by the due process right of a professional to practice his occupation, its violation in this case, as the Ninth Circuit concluded, was effected by the government's interference with a lawyer's right to communicate with, and counsel, his client – a right guaranteed by the First Amendment. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 513-14 (1961) (Douglas, J., dissenting) ("the counselor, whether priest, parent or teacher, no matter how small his audience – these too are beneficiaries of freedom of expression)."

Unlike virtually all of the cases relied on by the Petitioners, this case does not turn on the economic liberty interests that are commonly impinged when one is prevented from engaging in the occupation of one's choice. This case is different. Gabbert's claim is not an economic one based on a loss of income. Rather, his claim is that on the morning of March 21 he was prevented from carrying out an essential role in our accusatorial system of criminal justice. He was not simply there to protect his client as a matter of prosecutorial grace. He was there to protect the fundamental, constitutional rights of his client. In order to accomplish that goal, it was imperative that he be able both to give information to, and to receive information from, Baker. He could not protect her liberty interests in any meaningful way without this reciprocal communication. As Gabbert testified at his deposition:

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involve procedural due process claims. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972); *see also Cleveland Bd. of Educ. v. Lauderman*, 470 U.S. 532 (1985); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Morley's Auto Body, Inc. v. Hunter*, 70 F.3d 1209 (CA11 1996); *Daly v. Sprague*, 675 F.2d 716 (CA5 1982); *see generally Phillips v. Washington Legal Found.*, ___ U.S. ___, 118 S. Ct. 1925 (1998) (due process clause not at issue). However, Gabbert has never claimed a procedural due process violation in this lawsuit.

> In my experience in practicing criminal defense for a number of years – and I have advised numerous clients before grand juries – I find that a grand jury hearing is inherently stressful for the client. The client is always nervous.
>
> In this particular situation, the client was a target of a perjury investigation and had been asked to bring documents, the production of which tended to incriminate her. Immunity had been refused prior to that date. And now the lawyer who was supposed to be her champion and advocate to protect her before that tribunal was being searched and literally carried away.

(Appendix G, p. 7.) It is that impairment of Gabbert's fundamental right to represent and protect the fundamental rights of his client that defines the Fourteenth Amendment violation in this case.

The opinion in *Keker v. Procunier*, 398 F. Supp. 756 (E.D. Cal. 1975), is instructive. There, the court held that where state officials intrude into "the privacy and freedom from intrusion essential to the attorney-client relationship," an attorney's substantive due process right to practice his profession has been violated. 398 F. Supp. at 761. At issue in *Keker* were the conditions of attorney visiting rooms at Folsom State Prison. The court concluded that because communications between the attorneys and clients were, among other things, circumscribed by partitions and subject to continual surveillance, the attorney's ability to practice his profession was impeded. *Id.* at 761. The court's rationale was grounded on cases such as *Roe v. Wade*, 410 U.S. 113 (1973) and *Nyberg v. City of Virginia*, 495 F.2d 1342, *cert. denied*, 419 U.S. 891 (1974), which acknowledge a physician's right to practice his profession and his patient's correlative right to consult with him regarding his medical treatment; and on Sixth Amendment right to counsel cases, such as *Wounded Knee Legal Defense/Offense Com. v. F.B.I.*, 507 F.2d 1281 (CA8

1974), which hold that a client's Sixth Amendment right is necessarily dependent upon the attorney's right to practice his profession without government intrusion.

The analytical underpinning of these cases is the concept that where the fundamental role of the professional is to counsel a client, that is, to provide information so that another person may make an informed choice regarding conduct which may irrevocably alter his future, the professional cannot be silenced by the government. With respect to the role of a lawyer, the *Keker* Court stated:

> Legal issues and questions pervade virtually all aspects of our increasingly complex society. The modern attorney must at times be lawyer, counselor and advocate. Just as the physician is entrusted by society with the enhancement and preservation of life and health, the attorney is charged with advancement and protection of property, of liberty, and occasionally, of life.

398 F. Supp. at 760, citing *Nyberg v. Virginia* and *Young Women's Christian Ass'n of Princeton v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972). The court went on to conclude: "The [the lawyer's] right to practice a profession necessarily includes the right to practice according to the highest standards of that profession. At the foundation of the legal practice is the right to maintain the privacy and freedom from intrusion essential to the attorney-client relationship." 398 F. Supp. at 761 (citation omitted).

Keker also relied on more venerable cases of this Court, such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), which involved a teacher's right to teach and a parent's right to educate their children as they see fit. In *Meyer* a state statute banned the teaching of German in Nebraska schools. Although the statute did not prohibit the plaintiff teacher from teaching all courses – the Court noted that teaching German was just a part of Meyer's occupation – the Court nonetheless held that it violated Meyer's

substantive due process right to practice his profession. As the Court concluded, the interference with the teacher's "right thus to teach and the right of the parents to engage him so to instruct their children" was "plain enough". 262 U.S. at 400, 402; *see also Goss v. Lopez*, 419 U.S. 565, 576 (1975) (suspension of child from school implicates due process liberty interests because of corresponding deprivation of education).

The common thread uniting the cases cited above and the case before this Court is that the rights of the professional are so intertwined with that of the recipient of the professional services, that the interference with the professional's constitutional right and ability to do his job necessarily results in an equivalent interference with the client's constitutional right and ability to obtain those services. Thus, where as here, when the client depends on professional judgment to make critical life choices, the interference with the ability to practice one's profession is eviscerated at the moment the government prevents the professional from offering his judgment.[16]

What *Meyer, Keker, Wounded Knee* and other cases also teach is that where fundamental rights are at issue, the length, breadth and duration of the violation are irrelevant. In these situations, even a minimal, temporary violation is actionable as long as the Constitution has been infringed. As Judge Posner eloquently wrote:

> The law does not excuse crimes or torts merely because the harm inflicted is small. You are not privileged to kill a person because he has only one minute to live, or to steal a penny from a Rockefeller. The size of the loss is relevant sometimes to jurisdiction, often to punishment,

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[16] Although lawyers and physicians are obvious illustrations of this unique relationship, another equally sensitive and important relationship exists between a priest and penitent.

and always to damages, but rarely if ever to the existence of a legal wrong.

Hessel v. O'Hearn, 977 F.2d 299, 303 (CA7 1992); *see also Lewis v. Woods*, 848 F.2d 649, 651 (CA5 1988) (holding that constitutional violation is never *de minimis*). There are multiple other illustrations of this principle. For example:

- *The Right to Freedom of Speech*

The government does not have to entirely ban speech in order to violate First Amendment rights, a temporary disruption will suffice. *See, e.g., Gibson v. United States*, 781 F.2d 1334 (CA9 1986) (flying police helicopter over plaintiff's apartment to disrupt meeting violates First Amendment).

- *The Right to Be Free from Unreasonable Searches and Seizures*

A limited search of a pocket may be unreasonable. *Terry v. Ohio*, 392 U.S. 29-30 (1968) (even a minimal search of outer clothing constitutes intrusion upon "cherished personal security"). Furthermore, the seizing of a single item beyond the scope of a warrant violates the Fourth Amendment. *Hessell v. O'Hearn*, 977 F.2d 299, 303-304 (CA7 1992) (taking a can of Coca Cola from suspect's refrigerator during search violates Fourth Amendment).

- *The Right to Travel*

In order to violate the right to travel, a complete ban on travel is unnecessary; it may be violated by durational residency requirement for governmental benefits. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (residency requirement for welfare benefit held invalid as restriction on fundamental right to travel).

- *The Right to Vote*

Where the right to vote is not prohibited, but only diluted, the right of suffrage has nonetheless been denied. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (right of suffrage denied by dilution of weight of vote just as effectively as by wholly prohibiting the right to vote);

McCarthy v. Garrahy, 460 F. Supp. 1042, 1049 (D.R.I. 1978) (constitutional right to vote infringed even where burden on access to the ballot is limited).

- *The Right to Own Property*

The constitutional protection of the rights of property owners does not depend on the value or the size of property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982) (constitutional protection for the rights of private property owners cannot be made dependent on size of area occupied); *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), *rev'd on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986) (hobby kit valued at $23.50 is constitutionally protected property).

Here, the constitutional harm was complete, and the resulting damage was done, when the prosecutors precluded Gabbert from advising his client.

In addition to violating Gabbert's due process rights, the prosecutors' conduct also implicated his First Amendment right to freedom of speech. The Constitution protects speech by professionals in a variety of circumstances and, in some cases, this Court accords speech by attorneys on matters of legal representation the "strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). Such protection has covered not only political speech, *see Gentile v. State Bar*, 501 U.S. 1030 (1991); *In re Primus*, 436 U.S. 412 (1978), but legal advertising, as well. *See Went For It, Inc.*, 515 U.S. at 622-23; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Bates v. State Bar*, 433 U.S. 350 (1977) (noting that truthful advertising serves significant societal interests and, even if entirely commercial, often carries critical information).

Unquestionably, the right of an attorney to advise clients to the best of one's ability, an ethical duty the attorney has sworn to uphold, falls squarely within the First Amendment. *Cf. Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (finding that a doctor has

an "obvious" First Amendment right to advise patients). As discussed above, the bedrock of the attorney-client relationship is free and open communication. *See also Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (Blackmun, J., dissenting) (noting a physician's "compelling" interest in conveying information to women seeking family planning advice). Moreover this sharing of information has repercussions outside the individual relationship; clients who possess enough information to make intelligent choices facilitate the efficient functioning of the judicial system. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In this case, the prosecutors engaged in purposeful conduct which unlawfully restricted Gabbert from giving counsel to his client.

The intentional sequestration of Gabbert was especially egregious because it imposed a prior restraint on the speaker. This Court has consistently held that prior restraints are the most serious invasions of the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Typically, prior restraint cases deal with injunctions or permits which prohibit or curtail speech. *See Alexander v. United States*, 509 U.S. 544, 550 (1993); *see generally* Allan Ides & Christopher N. May, *Constitutional Law – Individual Rights* (1998). In these instances, the speaker can choose to speak and violate his restraint. Here, Gabbert had no such choice. The prior restraint was absolute; the prosecutors' conduct was as effective as if they had sealed his mouth with tape.

The speech restraint in this case was also content-based. Gabbert had alerted the prosecutors days before his client's grand jury appearance of his intent to advise her to resist disclosing incriminating information. It was precisely for that reason that they chose to make him unavailable to give her that advice. This manner of restricting speech has been held by this Court to be particularly offensive. Singling out and penalizing speech

due to the speaker's viewpoint is a patent violation of the First and Fourteenth Amendments. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, [or] its ideas.").

The prosecutors prevented Gabbert from speaking with his client because of who he is and the message he would have conveyed. Because his communication with Baker would have been detrimental to their success in obtaining incriminatory evidence from Baker, the prosecutors timed the execution of the warrant precisely so as to restrain his speech. Even absent due process limitations on such unreasonable conduct by governmental actors, the First Amendment would forbid it.

C. THE PROSECUTORS INTERFERED WITH GABBERT'S RELATIONSHIP WITH HIS CLIENT

1. The Execution of The Search Warrant Was Timed to Invade The Attorney-Client Relationship

Gabbert's client found herself on the Monday morning of her grand jury appearance in a much more precarious situation than the average grand jury witness. In the first place, she had already been targeted for prosecution by the grand jury making her more vulnerable than an ordinary witness. Moreover, she was called into the grand jury on the heels of a discussion about her possible arrest, which led her to understand it to be a potentially imminent event. In fact, it was her belief, as her lawyer was being led away to be searched, that Conn might cause her to be arrested in the hallway of the courthouse. (2 J.A. 476.) While she was depending on the lawyer she had hired to help her navigate these hostile waters and guide her to safety, the prosecutors made sure that she

would find no safe harbor there. As the Ninth Circuit found: "The only apparent reason to have both [the search and grand jury appearance] occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client." (App. A to Pet. for Writ of Cert., p. 14.)

A review of the course of conduct by the District Attorneys in this case shows that it was deliberately designed to achieve a specific goal – to frighten, intimidate and finally separate a young woman from her lawyer and to then take advantage of that isolation, to elicit incriminating information from her without benefit of counsel. It began with Zoeller and Miller's (agents of the prosecutors) appearance at Baker's home in late February. It continued with the prosecutors' search of her home on Friday night, March 18, in clear violation of the California Rules of Professional Conduct. It continued further on the morning of March 21 when Conn deceived her and Gabbert into believing that she was going to be granted immunity. That deception was followed by Conn's thinly veiled intimidation tactic of asking Gabbert in his client's presence if she would surrender and save them the trouble of arresting her. The prosecutors' maneuvering finally culminated in the execution of the search warrant and the client's simultaneous grand jury appearance and questioning. With refreshing candor, Petitioners' attorney conceded at oral argument before the Ninth Circuit that the service of the search warrant was timed "to take advantage . . . of the nervousness of the client [and] the distraction this would cause to the attorney." (Appendix B, pp. 27-28.)

The impact of Petitioners' strategy on Gabbert's client was severe. As she related in her deposition:

> And I came out [of the grand jury room] and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point – at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they said, "Too bad," but they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

(2 J.A. 469-470.) Just as the client was deprived of the assistance she had retained her attorney to provide, so was the Respondent prevented by the Petitioners' conduct from rendering the expert counsel he had been hired to provide. As Gabbert expressed:

> This impaired the relationship of special trust and confidence that inures in the attorney-client relationship because she was looking at me and I'm being searched. How am I going to protect her? How can she really rely on my advice if this is being done to me? She is a layperson.

(Appendix G, p. 7.)

Such deliberate conduct by the prosecutors in preventing an attorney from assisting a client in exercising her fundamental rights violates the Due Process Clause of the Fourteenth Amendment because the conduct "shocks the conscience" of a civilized society. In *Moran v. Burbine*, 475 U.S. 412 (1986), this Court found that the defendant's *Miranda* rights were not violated when he knowingly and

voluntarily waived those rights even though the police deceived him about his lawyer's availability and his lawyer about his questioning. In finding a waiver of the defendant's rights, the Court's *Miranda* analysis focused on his state of mind and not on the police misconduct. *Id.* at 421-422. In fact, the defendant never asked to speak to an attorney; he "spontaneously initiated" his first and most damaging confession. *Id.* With respect to the defendant's due process claim, where the Court did focus not on the defendant's or his lawyer's state of mind, but on the police misconduct, this Court found that while the conduct was troubling, it fell short of the kind of misbehavior to so shock "the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the states."[17] *Id.* at 433-34. The Court did find, however, that: "We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation." *Id.* at 432.

We respectfully urge that the misbehavior in this case rises beyond that level and warrants the conclusion that a due process violation occurred. We note that Justice Stevens, in his vigorous dissent in *Moran*, catalogued a string of state court cases where remedial action was taken by different courts on various factual showings involving defendants and their lawyers who were the victims of misleading statements by the police. The facts in each of those cases, as the facts in *Moran*, involved police deception. *Moran v. Burbine*, 475 U.S. 412, 441 (1986). In *Moran*, for instance, the lawyer was simply given false information about the lack of questioning and not told that her client would be questioned about a particular murder charge. *Id.* at 416-17. None of these

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[17] The Court did acknowledge that its decision was at odds with a number of state courts' decisions and the policy recommendations embodied in the American Bar Association Standards of Criminal Justice.

cases rises, however, to the level of affirmative activity (which we have here) by a prosecutor who causes the physical removal of the client's lawyer so as to make him unavailable during the client's questioning. And none of those cases appears to involve the intimidating circumstances which surrounded the client here or the calculated maneuverings of the petitioners.

In his dissent in *Moran*, Justice Stevens looked back on those cases where this Court "has given a more thoughtful consideration to the requirements of due process" and found that violations did occur. *Id.* at 466. These violations range through a variety of examples of prosecutional misconduct, but all are based on the unquestioned principle "that due process requires fairness, integrity and honor in the operation of the criminal justice system, and its treatment of the citizen's cardinal constitutional protections." *Id.* Justice Stevens concluded his dissent with words that clearly describe the position the Respondent strenuously advances here:

> This case turns on a proper appraisal of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers – as in an inquisitional society – then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights – as in our accusatorial society – then today's decision makes no sense at all.

Id. at 468.

Petitioners maintain that even if Gabbert's ability to advise Baker was impaired, the responsibility lies with Gabbert and Baker. That claim is disingenuous and strains the bounds of credulity. The Petitioners' course of conduct left him no other choice. Indeed, the Petitioners' conduct forced Gabbert into choosing whether to attempt to protect the attorney-client privileged files of Baker and several other clients, and hope the prosecutors would

honor his request that the questioning of Baker be delayed, or remain available to Baker, and allow the special master to rummage unfettered through his client files, thereby potentially waiving privileges held by both Baker and other clients. A prosecutor should not be permitted to create such an untenable choice. *See generally DeMassa v. Nunez*, 770 F.2d 1505 (CA9 1985). In any event, the subject of a search warrant does not have the prerogative of terminating or delaying its execution. *See* Cal. Penal Code § 166(5) (declaring it a misdemeanor to willfully offer resistance to the lawful process of a court); *Evans v. Bakersfield*, 22 Cal.App.4th 321, 27 Cal.Rptr.2d 406 (1994) (no right to physically resist even an unlawful detention).

Further, to contend that it was Baker's responsibility to cause the questioning to stop so that she could find her lawyer is similarly without merit. At the time of her testimony, Traci Baker was an unsophisticated, twenty-four year old waitress, who found herself in the unenviable position of being a target of a grand jury perjury investigation in connection with one of the most notorious murder trials of this century. To suggest that a terrified young women, who has just learned that she might be indicted and who has just had her lawyer apprehended by law enforcement officials, is supposed to unilaterally halt the machinery of the grand jury – including twenty three grand jurors and two veteran prosecutors – belies common sense and reason. Indeed, Baker's reluctance to anger or irritate the prosecutors was well justified in this case. When she refused to provide the answers they wanted before the grand jury, the foreperson, without any apparent authority, actually "held" her in contempt. (3 J.A. 616.) It cannot be acceptable in this context, or indeed in any other, for prosecutors to cause the search of a witness' lawyer and then blame the witness for being unable to consult with that lawyer.

2. The Facial Validity of the Warrant Does Not Preclude A Constitutional Violation

Petitioners maintain that because the search of Gabbert was pursuant to a valid warrant, and the warrant was executed by a special master as required by California state law, a Fourteenth Amendment violation could not have occurred. To begin with, Gabbert disputes that the warrant was validly obtained or executed by the special master.[18] Furthermore, contrary to the Petitioners' contentions, the facial validity of the warrant itself does not ameliorate the unreasonableness of the execution of the search warrant for the well-established reason that a lawful warrant may be executed in an unlawful manner.

There are numerous and varied restrictions on the execution of a warrant. For example, a warrant may not be executed in an impermissibly broad manner. *See United States v. Foster*, 100 F.3d 846, 849 (CA10 1996); *United States v. Disla*, 805 F.2d 1340, 1346 (CA9 1986); *see also United States v. Grandstaff*, 813 F.2d 1353, 1358 (CA9), *cert. denied*, 484 U.S. 837 (1987); *United States v. Gomez-Soto*, 723 F.2d 649, 654 (CA9), *cert. denied*, 466 U.S. 977 (1984); 2 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 4.10(d), at 671-72, 678-81 (3d ed. 1996).

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[18] Gabbert alleged in the complaint that the warrant contained material misstatements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). (1 J.A. 22, 128-130.) Moreover, the special master violated California law when searching Gabbert's briefcase. (1 J.A. 26; *see also* Plaintiffs Mot. for Leave to File First Am. Compl., filed January 9, 1995; App. A to Pet. for Writ of Cert., p. 25.) As the Ninth Circuit commented, "[the special master] violated several provisions of the California statute regulating the execution of a search of an attorney." (citation omitted). Additionally, the Court stated, "his decision that Gabbert's files contained no privileged material . . . is contrary to even the most basic understanding of the attorney-client privilege." (App. A to Pet. for Writ of Cert., p. 19 n.6.)

Another limitation is the requirement that officers must "knock and announce" before entering a suspect's home. *See Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). Similarly, repetitive searches are not permissible without additional authority. *See* LaFave, § 4.10(a); *see also United States v. Mittleman*, 999 F.2d 440, 442-43 (CA9 1993). At bottom, a government official may never enforce a facially valid statute, policy or warrant in an "egregious manner." *See, e.g., Pierce v. Multnomah County*, 76 F.3d 1032, 1037 (CA9 1996); *Grossman v. Portland*, 33 F.3d 1200, 1209-10 (CA9 1994); *Chew v. Gates*, 27 F.3d 1432, 1449-50 (CA9), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1097 (1994); *see also Malley v. Briggs*, 475 U.S. 335, 346 (1986) (noting that officers must exercise "reasonable professional judgment" in applying for a warrant).

What is at issue before this Court is not an incidental or unavoidable delay caused by the government. Whether a warrant should have been obtained for Gabbert in the first instance, or whether that warrant itself was lawful, is similarly not at issue. Rather, what is at issue is a deliberate course of conduct by Conn and Najera which had the trappings of lawfulness, but which was actually designed to interfere with an attorney-client relationship at the precise instant that client needed her attorney most. It is of no moment that the vehicle they chose as their mode of interference was itself arguably lawful, when their overall plan was implemented in such a blatantly unlawful manner.

D. PETITIONERS ACTED, AT THE VERY LEAST, IN A MANNER WHICH WAS DELIBERATELY INDIFFERENT TO GABBERT'S RIGHT TO COUNSEL HIS CLIENT

Traditionally, it has been held that in order to state a violation of substantive due process, it must be demonstrated that the government official's conduct "shocked

the conscience." *See Rochin v. California*, 342 U.S. 165, 172-73 (1952). This Court has noted that this standard, in a vacuum, creates a risk of subjective imprecision in application. *See, e.g., County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1722 (1998) (Kennedy, J., concurring). In *Lewis*, the Court clarified the test for determining what is shocking to the conscience, concluding that it will vary depending upon the context in which the alleged violation occurred. 118 S. Ct. at 1720. Thus, the Court explained, in the context of a high speed police pursuit, intent by a police officer to cause harm must be demonstrated in order for the chase to be constitutionally actionable because a rapidly developing situation involving unforeseen circumstances required instant judgment. *Id.* The Court also reaffirmed that where, as here, the circumstances allow for reflection and deliberation, deliberate indifference alone may be deemed "truly shocking." *Id.*

Deliberate indifference, in substantive due process cases, has been defined by the lower courts in a variety of ways. For instance, the Ninth Circuit has described deliberate indifference as conduct that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Wedges/Ledges of Ca., Inc. v. City of Phoenix*, 24 F.3d 56, 65 (CA9 1994), citing *FDIC v. Henderson*, 940 F.2d 465, 474 (CA9 1991); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (CA9 1989), *cert. denied*, 494 U.S. 1016 (1990). The Third and Tenth Circuits have formulated the standard as ignoring a foreseeable or obvious risk. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 910 (CA3 1997); *Barrie v. Grand County, Utah*, 119 F.3d 862, 869 (CA10 1997).

The conduct of the Petitioners is far more egregious than a deliberate indifference standard would require.[19] Nor does it fall with the area of close calls identified by the Supreme Court in *Lewis*. Here, Gabbert has alleged precisely that type of action which the Court held was most likely to give rise to a substantive due process claim, *i.e.*, conduct which is intended to injure and is unjustifiable by any government interest. *See County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1711 (1998) (Kennedy, J., concurring). The actions here were not only unjustifiable by any legitimate interest, but were deliberately undertaken for the specific purpose of violating both Gabbert's and Baker's constitutional rights.

As the Ninth Circuit found, the prosecution's desire to gather evidence ran directly into "a defense attorney's right to consult with his client. The result is not a pretty picture. It is made all the worse because it appears to have been an entirely avoidable collision." (App. A to Pet. for Writ of Cert., p. 2.) Several reasonable alternatives were available. The prosecutors could have delayed the questioning of Baker until the search of Gabbert had been completed. It does not appear that the prosecution would have been disadvantaged by such a delay until they determined whether or not Gabbert had the letter. In fact, the obvious advantage in such a delay is that it would have given the prosecutors the ability to question Baker regarding the letter's contents if it had been obtained.

A second and far less intrusive alternative than the conduct employed here would have been the issuance of a subpoena *instanter* issued for Gabbert by the grand jury

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[19] As Judge Hawkins stated at oral argument in the Ninth Circuit, "if you describe what happened in this case to a stranger and didn't tell them what country it happened in, America is not the first place that would come to mind." (Appendix B, p. 22.)

foreperson. *See, e.g., United States v. Johnson*, 615 F.2d 1125, 1128 (CA5 1980). Significantly, United States Department of Justice Guidelines recommend that prosecutors not execute a search warrant on a non-target attorney unless a less intrusive means of obtaining the materials is unavailable. 7 Dept. of Justice Manual § 9-19.220 (1992-2 Supp.). In fact, subpoenaing Gabbert would have been fully consonant with the obvious intent of the California legislature in enacting Penal Code section 1524(c)(1), for it requires that a non-target attorney subject to a search first be allowed to voluntarily turn over the documents sought by the search warrant and thereby terminate the search, effectively transforming the warrant's execution into the functional equivalent of the service of a subpoena. As we have discussed elsewhere, section 1524(c)(1)'s option was never made available to Gabbert either because the prosecutors and the special master were unaware of it or because they chose to ignore it.

While errors of judgment or mistaken actions do not violate due process, "malicious, irrational and plainly arbitrary" actions do. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 (CA9 1989). Conn and Najera's conduct in this case can only be characterized as malicious, irrational and plainly arbitrary.

II. A PROFESSIONAL'S RIGHT TO ADVISE HIS CLIENT FREE FROM GOVERNMENTAL INTERFERENCE IS CLEARLY ESTABLISHED

Recently, this Court held that the "clearly established" standard utilized in the civil rights context is akin to the requirement that criminal statutes give "fair warning" of the proscribed conduct. *See United States v. Lanier*, ___ U.S. ___, 117 S. Ct. 1219, 1224-25, 1227 (1997). While this Court has never specifically articulated a mechanical test to determine when a right is clearly established, it

has provided ample guidance. For instance, in *Lanier*, the Court stated that the law may be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Lanier*, 117 S. Ct. at 1227. Further, "general statements of law are not inherently incapable of giving fair and clear warning. *Id*. Rather, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id*.[20] The Court also acknowledged that decisions of courts of appeals, as well as other courts, may be adequate to provide sufficient notice to a defendant. *Id*. at 1227; *see also Elder v. Holloway*, 510 U.S. 510, 516 (1994) (a court should use knowledge of its own precedents as well as other relevant precedents).

Petitioners contend that the Ninth Circuit adopted a new and faulty "common sense" standard to determine when a right is clearly established and that such a standard contradicts this Court's guidelines. However, the analysis employed by the Ninth Circuit is neither new nor inconsistent with the standards set forth by this Court or the analysis and reasoning employed by the Ninth and other Circuits. "Common sense," as used by the Ninth Circuit, simply refers to the principle that this Court has already articulated – that where either precedent or the obviousness of the violation itself demonstrates the illegality of the conduct, the right will be deemed to be clearly established. *See United States v.*

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[20] For example, as the lower court commented in *Lanier*, the fact that no case has held that a welfare official cannot sell a child into slavery does not also mean that the welfare official would be immune from damages. *United States v. Lanier*, 73 F.3d 1380, 1410 (CA6 1996), *cited in United States v. Lanier*, ___ U.S. ___, 117 S. Ct. 1219, 1227 (1997).

Lanier, ___ U.S. ___, 117 S. Ct. 1219, 1224-25, 1227 (1997); *see also Casteel v. Pieschek*, 3 F.3d 1050, 1053 (CA7 1993) (when conduct so patently violates Constitution, closely analogous, pre-existing case law unnecessary); *see generally Newell v. Sauser*, 79 F.3d 115, 117 (CA9 1996) ("common sense and precedent" establish that due process requires fair notice of prohibited conduct).

Petitioners assert that instead of the standard articulated by this Court, one of two rules they propose should be adopted. First, Petitioners contend that only the decisions of this Court should be used to determine whether a right is clearly established. Alternately, they propose that the Court should adopt a "bright line" test for making such determinations. (Pet'r Br., pp. 36-47.) The Petitioners' suggestions ignore the practical realities of the administration of justice and, more importantly, would, if adopted, threaten to repeal the promise of section 1983: that every person who, under color of state law, causes any citizen to be deprived of any rights secured by the Constitution and laws, shall be liable for that violation. *See* 42 U.S.C. § 1983 (1995).

Unquestionably, the referent cannot be limited to Supreme Court precedent, if only for practical reasons, and the Court in *Lanier* and *Elder* rejected such a restrictive approach.

Petitioners' alternate suggestion, that the Court adopt a "bright line" test is equally unappealing. Structuring the qualified immunity analysis in the manner advanced by Petitioners would render the standard an insuperable barrier. *See Melton v. City of Oklahoma City*, 879 F.2d 706, 729 n.37 (CA10), *cert. denied*, 435 U.S. 932 (1978). Petitioners' rule would, in essence, require an exact factual correspondence between the case at issue and the particulars of a specific, available precedent. In essence, Petitioners ask the Court to adopt a standard of criminal recklessness, as opposed to the less rigid, but nonetheless objective, standard applied in this Court's

prior cases. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") While this Court has held that such a standard may be appropriate in Eighth Amendment cases, it has specifically rejected its application to other types of due process violations. *See Farmer v. Brennan*, 511 U.S. 825, 845-47 (1994).

Because section 1983 "may offer the only realistic avenue for vindication of constitutional guarantees," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), neither this Court nor the circuit courts have required the level of precision urged by the Petitioners. As the Third Circuit has commented: "insisting on precise factual correspondence between the conduct at issue and reported case law is tantamount to permitting officials one liability-free violation of a constitutional or statutory right." *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 145 (1984); *see also Chew v. Gates*, 27 F.3d 1432, 1449-50 (CA9 1994) (fact that new tactic is used by government does not mean that clearly established constitutional right has not been violated). Similarly, the Sixth Circuit in the context of a substantive due process claim, stated:

> While . . . there is a good deal of uncertainty with regard to the precise contours of substantive due process, it does not follow that state actors are insulated from liability on all such claims, no matter what the underlying facts may be. The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation. Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known . . . that their actions violated that right.

Stemler v. City of Florence, 126 F.3d 856, 867 (CA6 1997) (footnote omitted).

In this case, the constitutional rights at issue are clear. A lawyer has a Fourteenth Amendment right to represent his client at a critical proceeding before a tribunal and a corresponding First Amendment right to communicate advice to his client in connection with that representation. Moreover, he has a right to fulfill these professional obligations without unreasonable government interference that would altogether preclude him from counseling the client during the proceedings. Even in the absence of more specific case law, these rules applied with "obvious clarity" to the prosecutors conduct and were, thus, clearly established.[21]

More particularized case law, however, did exist and did give notice to the prosecutors that their conduct violated Gabbert's constitutional rights. *Keker*, and the cases upon which it relies,[22] plainly stand for the proposition that the government may not interfere with the right

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[21] The Ninth Circuit observed that "[t]he unusual facts of this case preclude 'the very action in question' to be clearly established in our case law. Nevertheless, long-standing precedent establishes the importance of the attorney-client relationship during a client's grand jury testimony." (App. A to Pet. for Writ of Cert., pp. 12-13.)

[22] *Keker* is a concrete, fact-laden illustration of the governing constitutional principles. Even if *Keker* were the only applicable law extant, it would still suffice to render the right clearly established. *See, e.g., Ward v. County of San Diego*, 791 F.2d 1329, 1332 (CA9 1986), *cert. denied*, 483 U.S. 1020 (1987) (court should look to all available decisional law, including district courts); *see also Wood v. Ostrander*, 879 F.2d 583, 591 (CA9 1989), *cert. denied*, 498 U.S. 938 (1990) (court should look to all decisional law); *accord Romero v. Kitsap*, 931 F.2d 624 (CA9 1991);

of a professional to give advice to a client during a proceeding at which the client's constitutional rights are at risk and she is entitled to the advice of the attorney to safeguard them. Unquestionably, this right is deeply rooted in law, in customs, and in the practical aspects of our accusatorial system of criminal justice. The applicability of these principles requires no legal prognostication of the part of the government officials in this case. Moreover, Petitioners themselves are lawyers. They, as veteran prosecutors, should certainly be charged with the knowledge of the constitutional principles governing attorney-client relationships in a grand jury setting. In any event, neither their ignorance nor defiance of the clearly established governing law operates to immunize their misconduct.

CONCLUSION

For the foregoing reasons, the ruling of the Ninth Circuit should be affirmed.

Respectfully submitted,

MICHAEL J. LIGHTFOOT*
STEPHEN B. SADOWSKY
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT, VANDEVELDE
SADOWSKY, MEDVENE & LEVINE
655 South Hope Street, 13th Floor
Los Angeles, California 90017-3211
Telephone: (213) 622-4750

Counsel for Respondent
Paul L. Gabbert

**Counsel of Record*

Klock v. Cain, 813 F. Supp. 1430, 1431 (C.D. Cal. 1993) (officials charged with knowledge of all available case law).

APPENDIX A

STATE STATUTES ALLOWING COUNSEL INSIDE THE GRAND JURY ROOM

ARIZONA: Persons under investigation are allowed presence of counsel while they testify. Ariz. Rev. Stat. Ann., Rules of Crim. Proc., Rule 12.6 (West 1996)

COLORADO: Any witness is allowed assistance of counsel during questioning. Colo. Rev. Stat., Rules of Crim. Proc., Rule 6.2(b) (1984)

CONNECTICUT: Any witness is allowed assistance of counsel during questioning. Conn. Gen. Stat. § 54-47f.(d) (1997)

FLORIDA: Any witness is permitted to have an attorney present during questioning. Fla. Stat. § 905.17(2) (1997)

ILLINOIS: Any witness has the right to be accompanied by counsel during questioning. 725 Ill. Comp. Stat. 5/112-4.1 (West 1996)

INDIANA: Persons under investigation are allowed to consult with an attorney, and court will appoint counsel for any such parties who cannot afford their own. Ind. Code § 35-34-2-5.5 (1993)

KANSAS: Any witness is allowed to have counsel present during questioning, and court will appoint counsel for those unable to afford their own. Kan. Stat. Ann. § 22-3009 (1995)

LOUISIANA: Persons under investigation may be accompanied by counsel during their testimony. La. Code Crim. Proc. Ann. art. 433 (West 1998)

MASSACHUSETTS: Any witness is allowed to have counsel present in the grand jury room. Mass. Gen. Laws Ann., Rules of Crim. Proc., Rule 5(c) (West 1995)

MICHIGAN: Any witness has the right to presence of counsel in the grand jury room. Michigan Stat. Ann. § 28.959(5) (Law. Co-op. 1996)

NEBRASKA: Any witness is entitled to assistance of counsel during questioning by the grand jury. Neb. Rev. Stat. § 29-1411(2) (1995)

NEVADA: Persons under investigation are entitled to assistance of counsel while appearing before the grand jury. Nev. Rev. Stat. § 172.239 (1995)

NEW MEXICO: Persons under investigation are entitled to the presence of counsel in the grand jury room. N.M. Stat. Ann. § 6-4 (Michie 1984)

NEW YORK: Any witness willing to waive immunity is entitled to be accompanied by counsel, and court will provide counsel to parties who cannot afford their own. N.Y. Crim. Proc. Law § 190.12(1) (McKinney 1993)

OKLAHOMA: Any witness is entitled to the presence of counsel while testifying. Okla. Stat. Ann. tit. 22, § 340 (West 1992)

PENNSYLVANIA: Any witness is entitled to the presence of counsel, and the court will provide counsel for those unable to afford their own. 42 Pa. Con. Stat. § 4549(c) (1992)

SOUTH DAKOTA: Any witness may have the presence of counsel while appearing before the grand jury. S.D. Codified Laws, § 23A-5-11 (Michie 1998)

TENNESSEE: Formally codifies the right of any witness to leave the grand jury room for consultations with his attorney. Tenn. Code Ann. § 40-12-216 (1998)

UTAH: Any witness has the right to be represented by counsel. Utah Code Ann. § 77-10a-13(4)(a) (1998)

WASHINGTON: Any witness may be accompanied by counsel unless given immunity; witnesses testifying under immunity may still leave the grand jury room during questioning to consult with an attorney. Wash. Rev. Code § 10.27.120 (1998)

WISCONSIN: Any witness appearing before the grand jury may have counsel present. Wisc. Stat. § 756.145 (1993-94)

APPENDIX B

[p. 2] **UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

PAUL L. GABBERT, Plaintiff-Appellant, vs. DAVID CONN; CAROL NAJERA; LESLIE ZOELLER; ELLIOT OPPENHEIM, Defendants-Appellees,	)	No. 95-56610 D.C. NO. CV-94-04227-RSWL

Reporter's Transcript Of Audiocasette Recording Of Proceedings

September 11, 1997 – Pasadena, California

Before: Harry Pregerson and Michael Daly Hawkins, Circuit Judges, and Charles R. Weiner,* District Judge

DEBRA L. VENTURA, CSR 9860
Deposition Reporter
744 East Walnut Street
Pasadena, California 91101

* Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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[p. 4] PASADENA, CALIFORNIA; SEPTEMBER 11, 1997 9:00 A.M.

THE COURT: *Gabbert vs. Conn.*

MR. LIGHTFOOT: Good morning, your Honors. May it please the Court, I'm Michael Lightfoot. I am representing Paul Gabbert, who is present in court today. He is the plaintiff and appellant in this case. Mr. Gabbert is a criminal defense attorney here in Los Angeles and has been for many years.

Three years ago, Mr. Gabbert was retained by a young woman to represent her with respect to an investigation of her as a target in a Los Angeles County grand jury investigation.

THE COURT: We've read the briefs. I think we know what the facts are. What is the clearly established right that your client believes was violated?

MR. LIGHTFOOT: The right to practice his chosen profession.

On the morning of Monday, March the 21st –

THE COURT: Again, we've read the briefs. We understand that they served a search warrant at what [p. 5] apparently was the exact time his client was supposed to appear in front of a grand jury.

MR. LIGHTFOOT: That's correct, your Honor.

THE COURT: Which, when I read these briefs, I would have thought that the clearly established right that you would have focused on – doesn't mean I'm right or wrong – would have been an interference with his ability to communicate with his client and advise her, as was her right, to seek advice from her counsel during her grand jury appearance.

MR. LIGHTFOOT: Well –

THE COURT: Now, do I have that wrong?

MR. LIGHTFOOT: No, you – you asked me to specify the right. I specify the right as it's stated in Supreme Court cases. But the foundation of that right is the freedom from intrusion into the attorney-client relationship. I can't – other than the function that a criminal defense attorney performs in the course of a trial of somebody accused of a crime, it's hard to imagine a more significant role that a criminal defense attorney plays than that that was hopefully to be played by Mr. Gabbert that morning at the Grand Jury.

Because he – as your Honors know, she had received a subpoena through him the previous [p. 6] Thursday. He had attempted to file a motion to quash it on what appear to be clear Fifth Amendment grounds, at least Fifth Amendment production grounds. When the D.A. received notice of that, the two D.A.s and the Beverly Hills police officer went right to a judge in Los Angeles County court on Friday afternoon, proceeded down to her residence that Friday night in Orange County, executed a search warrant specifying the exact same document that was specified in the subpoena that had been served the day before.

When Mr. Gabbert gets up to the Grand Jury, he is standing with his client, and the prosecutors tell him in the presence of his client that she's a target, she's a perjury target. He discusses immunity.

THE COURT: Listen, I have –

MR. LIGHTFOOT: What I'm trying to –

THE COURT: I have no question but that the facts present a picture apparently where the search warrant is timed to be executed at the very time the client is appearing before the Grand Jury. I have no problem with that at all.

MR. LIGHTFOOT: All right. Well –

THE COURT: Let me tell you why I ask that question.

[p. 7] MR. LIGHTFOOT: Okay.

THE COURT: Because if that's the right that was interfered with, how do you deal with your client's statement in his own deposition that the first time she comes out of the grand jury room and the search warrant is being executed, and she's coming to him to seek his advice, and he's told that she's there, he says – and, you know, this is his words describing his own words at the time.

> He said, "She said, 'Your client wants to talk to you.' "And I said, 'I can't talk to her right now. I'm being searched.'
>
> "And she says, 'She has to talk to you right now because she has to go back in the Grand Jury.' And in this context it was clear it was urgent.
>
> "I said, in effect, That's tough. They created this situation. They can wait as long as it takes."

MR. LIGHTFOOT: Your Honor –

THE COURT: How can he complain that his [p. 8] ability to communicate with his client, who needed his advice, was being impaired when he tells them, Look it. I don't want to talk with her?

MR. LIGHTFOOT: He was the subject of the execution of a search warrant. He doesn't – the subject of a search warrant doesn't have the right to say to the person executing the warrant, I'm going to leave here. You're not going to perform the search because I have something else to do.

When the search was originally started by the 80-year-old Special Master, according to the California provision in the Penal Code Section 1524, specifically if the lawyer says to the Master, these documents are privileged, it has to stop. So he had said to the Master –

THE COURT: I've got – believe me. I've got some questions for your opponents in the case. But my question which I still have is: If the real hub of the problem here was that the search warrant was executed at the very time the client needed advice from her lawyer, doesn't the passage I read to you from your client's own deposition suggested that he caused that conflict by his own actions?

MR. LIGHTFOOT: I don't think so, your Honor. I think that –

[p. 9] THE COURT: When he tells them, Look it. I don't want to talk with her. They are searching right now. I don't want to give her advice.

MR. LIGHTFOOT: He did want to talk with her. He couldn't talk with her because he was being searched.

It's like saying – it's like if he had come up on the elevator with his client, and as the client got off the elevator, they locked him in the elevator, he can't get in there. He's physically obstructed from getting in to assist her. He's being searched by an officer of the Court, somebody who has been directed by a judicial officer to conduct a search.

THE COURT: Does the record show that he was – that if he had wanted to talk with her at that moment that he was physically restrained from doing so?

MR. LIGHTFOOT: Well, I don't think the record speaks to that, but I think the Court could take judicial notice of the fact that an individual is not free to leave the area when his person is being searched or his effects are being searched.

THE COURT: The person who apparently comes in the door is D.A. Conn's secretary –

MR. LIGHTFOOT: Ms. Fairbanks.

THE COURT: – who knocks on the door where your client is with the 80-year-old Special Master, and [p. 10] the secretary says, "Your client needs to talk to you. She says it's urgent."

MR. LIGHTFOOT: That's right.

THE COURT: Why can't he talk with her?

MR. LIGHTFOOT: Because he's being searched, your Honor. He's not free to leave – to leave the vicinity where the search is taking place. He's the one whose – his – the warrant calls for the search of his person.

JUDGE 2: Answer a question for me, Mr. Lightfoot, if you would please.

MR. LIGHTFOOT: Yes, your Honor.

JUDGE 2: Why does the client, his client then go back to the grand jury room and say, "On advice of counsel, I spoke to my counsel, and this is what I'm going to do"?

MR. LIGHTFOOT: Because in her deposition she said she came out. She was frightened beyond words. She wasn't sure why she got the message. It may have been body language from Mr. Gabbert. She's not sure. But the message to her was – in this state of fright – go back and invoke the Fifth Amendment. And she does that. And then they ask her the same question again.

It's hard to imagine a question –

[p. 11] JUDGE 3: She could see her attorney through a glass window.

MR. LIGHTFOOT: Yes, that's correct, your Honor. She said three to five car lengths away. And then I think Mr. Gabbert said it was a room approximately 40 foot away from the grand jury room.

JUDGE 2: Could she have gone back to the grand jury and said, I didn't have a chance to talk to my lawyer. He's being searched?

MR. LIGHTFOOT: You know, your Honor, this is a young woman with no legal experience sitting in a – she thought there was 50 people in there. That's an exaggeration because there are only 23 then the two prosecutors. But this is a – this is a – to put it mildly, probably the

most frightening experience in the legal system that she or any other witness could have.

She has just been told that she's a target. They've talked about whether she's going to be arrested or whether she's going to be allowed to surrender. She said that thoughts that were going through her mind was is she going to be arrested. Her only rock is now being searched by somebody 40 feet away. She is thinking to herself, how am I going to get bail.

That is not the way our system is [p. 12] supposed to operate.

JUDGE 2: Well, if she went back to the Grand Jury and said, I couldn't talk to my lawyer, therefore, I can't answer your question. I can't do anything until my lawyer is in a position to counsel me.

MR. LIGHTFOOT: Well, you know what, your Honor, maybe if she was brighter, she should have said that. But what she did was she did the best she could. She obviously –

THE COURT: Which wasn't bad.

MR. LIGHTFOOT: Which wasn't bad at all. And then what happens is they ask, "Do you know Lyle Menendez?" It's hard to imagine a question that's more incriminating. And to a sophisticated D.A., if she answers it, she probably opens the door and waives the privilege to other questions.

And she says again, "I've got to go out, and I have to talk to my lawyer."

Then she comes back in, and she says that Mr. Conn gets angry and threatens to hold her in contempt. She was actually held in contempt – formally held in contempt by the grand jury foreperson.

I didn't understand that a foreperson had that power. I thought a judge had to do that.

[p. 13] JUDGE 2: Only in California.

MR. LIGHTFOOT: Only – only in a downtown court. Not in a federal building, your Honor. I can assure you of that.

But I can't imagine a more intimidating situation. And it's clear what the intent of the prosecutors were. The warrant itself that they got that morning – you know, they lulled Mr. Gabbert into thinking they were writing an immunity letter, as you know from the briefs from the record.

And so he is down there with his client thinking they're going to give them at least use immunity. They come with a search warrant not just for him. A search warrant for his person and effects, and the same warrant calls for a search warrant, a search of her person.

JUDGE 2: Didn't she tell them she had this letter?

MR. LIGHTFOOT: She told them that – she told them on Friday night. Is that what you are talking about, your Honor?

JUDGE 2: Yes, sir.

MR. LIGHTFOOT: That she had given documents to her lawyer. That's what she had told them.

JUDGE 2: Right. And among those documents was [p. 14] this letter that they were looking for.

MR. LIGHTFOOT: Well, I don't know that she told them that. She said all the documents that she had she had given to Mr. Gabbert.

JUDGE 2: Well, concerning this case.

MR. LIGHTFOOT: That's what the application says.

THE COURT: Well, there is this difference between two pages of the letter and the full letter. I sort of picked that up from –

MR. LIGHTFOOT: Well, Mr. Gabbert, in his deposition and in the Complaint indicates that he had two pages – copies. A copy –

THE COURT: Of two pages.

MR. LIGHTFOOT: – of two pages.

THE COURT: Which it turns out is exactly what the prosecutor said.

MR. LIGHTFOOT: Well, but he – it was his testimony that he actually gave it to the Master.

THE COURT: What they were looking for though was the full letter.

MR. LIGHTFOOT: Right.

THE COURT: That was the object of their search.

MR. LIGHTFOOT: That was never – that was [p. 15] never disclosed pursuant to warrant or any other method.

JUDGE 2: Shouldn't she have told her attorney that that's what she told them?

MR. LIGHTFOOT: I'm sorry, your Honor?

JUDGE 2: She didn't tell her attorney that that's what she told them?

MR. LIGHTFOOT: No, she didn't tell – she didn't tell them that on Friday night.

JUDGE 2: That's what I'm saying.

MR. LIGHTFOOT: Yeah.

JUDGE 2: She never bothered to tell him.

MR. LIGHTFOOT: You know, part of this whole course of conduct starts with a Thursday and the Friday night visit when they fully know that she's represented by a lawyer, who is going to contest the production of documents vigorously. And the lawyers go down there with the police officer and commit a gross violation of the Code of Professional Conduct in California by talking to her, the target of grand jury investigation, who they know is represented by an attorney.

Now, let me just get back to the point that you raise, Judge Weiner, that when they – when they came back to the environs of the grand jury with a search warrant, they had a warrant to search both [p. 16] Mr. Gabbert and Ms. Baker. And they had the Master, who is delegated by the judge to search Mr. Gabbert. And Mr. Zoeller, the Beverly

Hills police officer, was there to search, if they wanted to do this, to search the client.

They weren't interested in searching her. What they were interested in was to separate the two, get him out of the way, bring her into the Grand Jury. They didn't ask her as the first question, Did you bring the document with you that is listed in the Subpoena Duces Tecum. They asked her for substantive information about her relationship with the primary defendant. So it's clear what they were trying to do here. They were using this as a pretext, this – this search.

THE COURT: We don't know what their intent was because they pretty consistently throughout this case refused to answer questions like that.

MR. LIGHTFOOT: Well, we – you know, we're here –

THE COURT: We can make inferences.

MR. LIGHTFOOT: And I think that, you know, where we are here after trial court dismissed our complaint, almost all of it, and then we lost the rest of it on summary judgment. We make inferences in favor [p. 17] of the evidence and inferences that we suggest.

THE COURT: You are certainly entitled to those. There is no question.

MR. LIGHTFOOT: But I say – I go back to the facts to suggest to the Court that I think it's fairly clear what they were doing here. That they were trying to get her into a position where she had to answer questions. And they knew that if Mr. Gabbert was there, because of the zeal he had already expressed in his – the motion that

he tried to file on Friday in his attempts to get them to grant her immunity before she said anything, that he was going to be an absolute obstacle to their doing that.

Now, I can't imagine a grosser interference with a lawyer's attempt to practice his profession. And it's one thing to say that, you know, you can't step in the way of a lawyer giving advice to a bankruptcy client. It's another thing to say that – here's a woman who is a target of a perjury investigation, who could very well be giving up the last pieces of information that fit the puzzle that give them the probable cause to seek an indictment, and say at that moment in time – where you don't have your lawyer able to be with you in the Grand Jury – we're not even going to let you go out and talk to him.

[p. 18] It's hard to imagine invading the relationship more than that.

THE COURT: Did anybody ever tell the client that she couldn't go out and talk with her lawyer?

MR. LIGHTFOOT: No, they never – no, they never said that.

THE COURT: That's what you just argued.

MR. LIGHTFOOT: Well, effectively, she went out the first time. She saw through the glass. She saw Mr. Gabbert.

THE COURT: I understand that. Again, we've all read the record.

MR. LIGHTFOOT: No, but –

THE COURT: I just want to be clear about that. At no point in time did any police officer or D.A. tell her, "You can't talk" (inaudible) –

MR. LIGHTFOOT: They never said that specifically. But the second time she went out, she didn't see him. She sat there. And she sat there for what she said was an eternity. Waiting. Waiting. Because she told them she wanted to talk to her lawyer. He never arrived.

She was then ordered to go back into the Grand Jury. And at that time she again invoked the Fifth, and that's when Mr. Conn got angry and told her [p. 19] he was going to have her held in contempt.

So I answered your question directly. It's an interference with his right to practice law. We're not litigating her, if she had one. I don't even know if she had one, a Sixth Amendment right at that point. We're not arguing they violated any grand jury norms or anything like that. We're not claiming that it's a defamation case. It's plain and simple interference with his right to practice his chosen profession.

And I have four minutes, and I will save those for rebuttal your Honor.

THE COURT: Thank you.

MR. MAC LATCHIE: Good morning, your Honors. May it please the Court, I am Scott MacLatchie. I represent Detective Zoeller, and Special Master Elliot Oppenheim.

I understand from comment Judge Hawkins made that Judge Hawkins had some questions regarding the carrying out of the search.

THE COURT: Yeah, why didn't you follow the statute? Why didn't you comply with the statute, your client?

MR. MAC LATCHIE: And you are referring to Detective Zoeller or Mr. Oppenheim?

[p. 20] THE COURT: I'm referring to everybody involved in this interesting affair. The statute, the California statute simply wasn't observed.

Isn't that true?

MR. MAC LATCHIE: It – well, I would, if taking what plaintiff says as –

THE COURT: Let's take it one step at a time, Counsel.

No. 1, the statute gives the object of the search the absolute right to say, I think these documents are privileges. Put them in an envelope and take them to a judge.

Isn't that correct?

MR. MAC LATCHIE: The statute does say, your Honor, that documents for which an assertion is made, that the determination of whether they shall be disclosed or not shall be made by a judge.

THE COURT: Not by this 80-year-old Special Master; right?

MR. MAC LATCHIE: That is correct. The determination whether to –

THE COURT: And that did not happen here. In fact, he went through Mr. Gabbert's files, including his

files from other cases. He had files with him that related to other clients, which by no stretch of the [p. 21] imagination were the business of the District Attorney. Isn't that correct?

MR. MAC LATCHIE: Mr. – according to the plaintiff, he says that that occurred. There is also evidence in the record that it was a quick flipping through. And then by the plaintiff, "Well, this is what I have."

He became –

THE COURT: Listen, the D.A. had no business looking at client files related to other clients, whether they flipped through it or took photocopies of it.

Isn't that correct?

MR. MAC LATCHIE: I would agree with that, your Honor, yes.

THE COURT: Okay. Let's deal with the second part of what this statute requires.

This statute says that once there is an assertion – first of all – second of all, the statute says only the Special Master may conduct the search; right?

MR. MAC LATCHIE: Yes, your Honor.

THE COURT: Without the consent of the object of the search; right?

[p. 22] MR. MAC LATCHIE: That's correct, your Honor.

THE COURT: That consent was never given.

MR. MAC LATCHIE: That – the consent was never given for the Special Master.

THE COURT: And despite that – despite that, there was a second search of this lawyer's briefcase and person, wasn't there?

MR. MAC LATCHIE: If you are referring to by Detective Zoeller looking at it, yes, that is alleged.

THE COURT: Okay. And that was a violation of the statute; right?

MR. MAC LATCHIE: That would be inconsistent with the mandate of the statute, yes, to have someone other than the Special Master look at it.

And I would, for purposes of being here today and for purposes of the District Court's rulings, I would concede that there was not technical compliance.

Although I might add, although maybe it's not the point to argue it here, that with regard to the first violation that your Honor has brought up or perceived –

THE COURT: Counsel, how can you argue lack of technical compliance when it looks like this statute was simply ignored?

[p. 23] MR. MAC LATCHIE: Only – only as to this, your Honor. I think that there is an assumption that has been made here that for a statute – well, particularly this statute – that if the object of the search indicates, I have documents in here that are privileged, and I don't want these being – these should not be disclosed, I think that the very nature of having a judicially appointed Special Master is to – well, for No. 1, let's say the object of the search says, "I don't have what's relevant here." The statute empowers the Special Master to overrule that and still look through.

I think that statute allows the Special Master – and, I agree, only the Special Master – to look through what's there. And even if something is alleged to be privileged, the Special Master – I don't think the statute says that the Special Master can't look at it.

I think that the statute is clear that if the Special Master feels that it should be turned over to the investigating officer or the party issuing the warrant, that then – and then it must be sealed and taken to the Judge. But I don't believe that the statute necessarily means that the Special Master, as soon as the object of the search says, "I have [p. 24] privileged documents," can't at least look and see.

Maybe those privileged documents, when the Special Master looks at it, has no bearing on the case, and, therefore, he'd say, "Fine. I don't even want to take those and burden the Judge."

THE COURT: How would he know that if he's just taking a glance? He'd have to read all that stuff.

MR. MAC LATCHIE: And in this case, maybe he should have been more thorough, which according to them would have worked only a more egregious violation.

THE COURT: His office should have had more respect for California law.

MR. MAC LATCHIE: Your Honor –

THE COURT: That's a pretty rotten thing to do to get a lawyer in a room and search him with a Special Master while a client goes before a Grand Jury.

I mean, is that something that the D.A.'s office is proud of?

MR. LIGHTFOOT: Your Honor, I don't know. And that same question may be addressed to my cocounsel who represents the D.A.s here.

I do know that, as the Court noted, we were dealing here with probably an ignorant – ignorant of specifics of a volunteer retired lawyer, who maybe got in over his head on this.

[p. 25] THE COURT: (Inaudible) the district attorneys were there, weren't they?

MR. MAC LATCHIE: I don't believe at the moment that the search was carried out they were there. I believe at least –

THE COURT: They were there the second time.

MR. MAC LATCHIE: I know Detective Zoeller was –

JUDGE 2: (Inaudible) were there. He was trying to talk to his lawyer. Now, why wouldn't they know – or had a opportunity to speak with her out of their hearing?

MR. MAC LATCHIE: Your Honor, I believe that the district attorneys were – one or both of them were at the grand jury room, and this was –

JUDGE 2: But they knew this was going on. I mean, they were not without knowledge.

MR. MAC LATCHIE: Oh, I'm sure they were aware that this was going on, your Honor.

JUDGE 2: When the woman walked out of the room, and they knew that the lawyer was being searched, how could he possibly communicate with her? How could he possibly counsel her or give her advice when all this was going on at the same time? Why would they have said to the people, "Let him go out and talk with [p. 26] her"?

MR. MAC LATCHIE: When she came out, apparently she wanted to talk to him, and that communicated to him, there is absolutely no evidence –

JUDGE 2: Yeah, but he couldn't get away. How could he walk away from that?

MR. MAC LATCHIE: There is absolutely no evidence he asked to leave. And if he asked to leave, was prevented from doing so. In these surroundings, we're not taking about a jail lockup. We're talking about a room open to the public, off a corridor, in a courthouse.

THE COURT: Here's my picture of what we had going on here, and you tell me if I'm wrong.

You have the right of the People, through the District Attorney and the police, to conduct an investigation that is ancillary to a very serious crime. They are looking for evidence that relates to it. We're between trial one and two, and they are looking for evidence –

JUDGE 2: In a high publicity case.

THE COURT: – in a high publicity case.

You've got a defendant – you've got a woman and an attorney. She's been called to the Grand Jury. She's been given a Subpoena Duces Tecum. She's [p. 27] supposed to

appear in front of the Grand Jury. She's got an obligation to appear and to testify, but also to have the advice of counsel. So you have these two competing interests.

Was there anything in the world that would have prevented the County Attorney from delaying her Grand Jury appearance until this warrant had been fully executed?

MR. MAC LATCHIE: The answer from my perspective, your Honor, is I don't know. I have not spoken to the County Attorneys. They were not my client. I have no information concerning the particular timing or if there were other matters behind this.

THE COURT: They were asked – they were asked that in Discovery in this case, and they refused to answer.

MR. MAC LATCHIE: I don't know the answer, your Honor.

THE COURT: So under the rules that we normally apply where a case is in this posture, how should we treat that?

MR. MAC LATCHIE: Treat whether –

THE COURT: The County's refusal to provide any reason when they were directly asked in Discovery, why [p. 28] couldn't you have delayed Ms. Baker's grand jury appearance while you carried out this search?

MR. MAC LATCHIE: I believe that in the posture we are here on, your Honor, is whether there was an actionable violation of – well, certainly of Mr. Gabbert's right.

JUDGE 2: Mr. MacLatchie, you're not answering Judge Hawkins' question.

MR. MAC LATCHIE: Well –

JUDGE 2: I mean, there is no reason in the world why they couldn't have delay the search –

MR. MAC LATCHIE: And.

JUDGE 2: – unless they wanted to create a problem between the witness – the client and the attorney.

What reason could there be? Think of one.

MR. MAC LATCHIE: I don't know, your Honor. Standing –

JUDGE 2: I'll give you an hour to think of one and come back while we deal with these other cases.

MR. MAC LATCHIE: Your Honor, I would – I cannot –

JUDGE 2: Give one plausible reason.

MR. MAC LATCHIE: Simply to work through the [p. 29] matter, and the fact that maybe there was another matter pending before the Grand Jury. I don't know.

JUDGE 2: To save time?

MR. MAC LATCHIE: Possibly.

THE COURT: I mean, if you describe what happened in this case to a stranger and didn't tell them what country it happened in, America is not the first place that would come to mind.

MR. MAC LATCHIE: Your Honor, I want to allow time for my cocounsel to speak.

I would just add that –

JUDGE 2: We'll give you more time.

MR. MAC LATCHIE: All right, your Honor. I would – I would add that with regard to whatever motivation, whatever rational was behind the District Attorney's thoughts in proceeding in this manner, I don't believe though addresses the liability issue here, the liability issue being whether there was a violation of the Fourth Amendment.

THE COURT: The Complaint alleges that they acted in utter disregard and disrespect of Ms. Baker's right to deal with her lawyer and her lawyer's right to carry out his profession. And we must assume those allegations to be true, especially in the face of the County refusing to provide a justification.

[p. 30] This case has been on the docket for a long time. It's been scheduled for oral argument for a long time. You're a bright and capable lawyer. You can't think of a reason that would justify this timing?

MR. MAC LATCHIE: And to be honest with you, your Honor, maybe I should have anticipated that and given it some thought. I – because the control of that aspect of it was not involving my clients, and I was – I did not think of that and cogitate on that issue. But I –

THE COURT: Maybe your – maybe your cocounsel could answer.

MR. MAC LATCHIE: I would just like to – I would just like to close with this. I believe though that this right, this Fourteenth Amendment right we're talking about – and certainly it's in the briefs, I won't argue that. We don't believe that District Court case, that Caker case, which plaintiff relies on, clearly establishes a right. Certainly is not within Anderson (inaudible) and Kraden's perimeters to the facts of this case. I would just point out that the – the nature of what is alleged does not rise to the level of a constitutional violation sufficient to deny qualified [p. 31] immunity to Detective Zoeller and to Mr. Oppenheim.

Thank you, your Honor.

THE COURT: Thank you.

MR. RENICK: Good morning, your Honors. I'm Steven Renick, representing David Conn and Carol Najera.

THE COURT: We probably should have directed some of these questions to you. And we fired some pretty hot and hard ones at your cocounsel.

You did a very good job at responding to them, I thought.

MR. RENICK: And I do appreciate him taking the initial flak.

THE COURT: So you could sit – now, you've had not only the chance of all these years preparing for oral argument and the like, but you've sat here and watched him tell us what the justification could have been.

Why couldn't the County Attorney, the District Attorney have delayed Ms. Baker's Grand Jury appearance while they executed the warrant?

MR. RENICK: Well, I have two answers to that. The first one is that David Conn, in the course of the litigation – I'm not sure whether it was a deposition, a Declaration attached to this –

[p. 32] THE COURT: I can barely hear you.

MR. RENICK: I'm sorry. David Conn explained in the course of the litigation, either in a Declaration and a deposition – I'm not quite sure where – that they didn't even prepare the search warrant for Mr. Gabbert and Ms. Baker until after they arrived at the grand jury room.

But frankly, I don't think we need –

THE COURT: That's a nonanswer.

MR. RENICK: Well –

THE COURT: I mean, this is – this is real easy to answer. You have a warrant you want to execute. You are going to serve it on the lawyer. You know there are special procedures involved. Put aside for the moment that you don't even follow them. But you've got a client of that lawyer who is going to appear in front of the Grand Jury. The act of serving the warrant and executing it prevents him from communicating – allegedly under the Complaint – with his client.

The solution seems obvious. Why not delay her appearance while you execute the warrant, even if you need to isolate the two of them?

MR. RENICK: The answer ultimately is is that [p. 33] it's a solution in search of a problem. The bottom line –

JUDGE 2: (Inaudible.)

MR. RENICK: It's a solution in search of a problem. Because the bottom line here is that we give prosecutors a certain amount of leeway to try and make their cases. I'd ask –

THE COURT: Suppose these prosecutors had found out by looking at the computer Mr. Gabbert had an outstanding traffic warrant. And they called the police department and said, "Gabbert's going to be pulling up in his Mercedes at the courthouse" – or his Chevy, or whatever it is. "There is an outstanding warrant. Arrest him. Take him down to County lockup, and keep him there while his client is in the Grand Jury."

Could they have done that?

MR. RENICK: I'm not sure, your Honor. And I'm not willing to go into that because that's not factually analogist to this case. And I would like to refer –

THE COURT: You know what? I get to answer the questions – ask the questions. You get to answer them.

MR. RENICK: I'm sorry, your Honor.

[p. 34] THE COURT: If you don't like my questions, that's your problem.

What about my hypothetical? Could they have done that?

MR. RENICK: Probably.

THE COURT: That would have been okay?

MR. RENICK: I don't think it would have been okay in the sense of your Honor's comment about which country are we in. I'm not going to defend.

If indeed the District Attorneys were acting in what might be called a devious manner, I'm not going to defend that. I'm not going to state to this Court that that is acting in the highest, you know, ethical guidelines of our profession.

But that's a far different matter than saying it's illegal, or contrary to statute, or constitutes a constitutional violation. And the reason –

THE COURT: We still have this question that's screaming out to be answered that neither of you have answered.

Why couldn't they have delayed the Grand Jury appearance?

MR. RENICK: Because they chose not to.

THE COURT: Okay.

[p. 35] MR. RENICK: And –

THE COURT: And why did they choose not to?

MR. RENICK: Probably to take advantage and – I mean, without getting into whether or not that's – in fact, let's assume that they were doing that to take advantage.

JUDGE 3: Take advantage of what?

MR. RENICK: Of the nervousness of the client, the distraction this would cause to the attorney.

I'd ask you to imagine for a moment that we're not dealing with a witness and her attorney, but we're dealing with an organized crime figure, and their well-connected attorney, and a prosecutor who has been trying, you know, vigorously to get somebody to be willing to testify.

THE COURT: It doesn't matter if that grand jury witness is the hit man for the Lucazzi family and the lawyer is a made member of that family. They still have a – that witness still has a right to come out of the Grand Jury, consult with a lawyer.

And the question is: Is there any pretext, any conceivable reason that would permit prosecutive authorities to interfere in the way they did here with that right?

MR. RENICK: That's the problem, your Honor, is [p. 36] when you say, as they did here, that isn't correct. If I may refer to Mr. Gabbert's own deposition testimony –

THE COURT: I've already read that to your opposing counsel.

MR. RENICK: No, not that one. Not that one.

THE COURT: Oh, you have something else?

MR. RENICK: Yes. When they were served with the warrant – this is on Page 13 of the excerpt of records. No it's – I'm sorry, your Honor – Page 352 of the excerpt of records.

"They'd entered into the empty room." Mr. Gabbert says, "Detective Zoeller then presented me with a search warrant. Served a search warrant on me for my briefcase and person, and Ms. Baker's person."

"QUESTION: What happens next?"

"I don't know if this is precise chronology, but within seconds, Ms. Baker was called before the Grand Jury."

"Who called her before the [p. 37] Grand Jury?"

"I don't know whether it was a foreperson or Mr. Conn. I was introduced to Mr. Oppenheim, who was a Special Master. I said, 'We'll need a private room.' "

The only reason Mr. Gabbert left the door to the Grand Jury room was because he chose to leave it.

THE COURT: What do you want him to do? You want him to stand out in front of the jury room, be searched, have his pockets turned inside out, go through his briefcase in a public area where other people can see all of this?

MR. RENICK: Yes. If his concern –

THE COURT: That's what he should have done?

MR. RENICK: If his concern was his client, if his –

THE COURT: Strip me naked right here. That's all right.

MR. RENICK: If necessary. If the issue here, as your Honor has put it, is interference with the ability of the attorney to communicate with his client, the burden was on the attorney.

THE COURT: Let me ask you this.

MR. RENICK: Yes.

[p. 38] THE COURT: Has this procedure ever been followed in the past in the history of Los Angeles County?

MR. RENICK: I believe so. I believe Mr. Oppenheim had done it before. But I don't – I can't give you chapter and verse.

THE COURT: I mean where you have got – where you've got a client going in the Grand Jury room, and you've got the lawyer there, and you have got a search warrant, and you have got a Special Master there and all the rests, has that ever happened before?

MR. RENICK: I don't know, your Honor. I wouldn't want to –

JUDGE 2: Mr. Renick, don't you think the public officer has a duty to uphold certain standards and certain ethics? And if the people on the other side don't have that, whatever criminals and so on, you think the public office ought to engage in the same kind of activity to out maneuver them?

MR. RENICK: I'm not going to hold what happened up and say this is the way we want people to act.

JUDGE 2: Tell us a procedure before the Supreme Court where the Solicitor General gets up and

confesses error where the government has taken [p. 39] advantage of somebody?

MR. RENICK: I think that's a very noble and is the way we should –

JUDGE 2: It's not noble. It's actually – it's what the Constitution requires. It's a document of prohibition to prohibit the government from over reaching the people.

MR. RENICK: I agree.

JUDGE 2: Don't tell me it's okay because you want to make somebody nervous. You want to take advantage of them. Is that what it's about? It's not a game. I mean, you have all the tools.

MR. RENICK: Yes, but –

JUDGE 2: You don't have to use them all.

MR. RENICK: I agree, your Honor. But we are here asking not whether or not this smells, but whether or not it violated the Constitution.

JUDGE 2: What do you think that's doing when you don't let somebody talk to their lawyer?

MR. RENICK: We didn't –

JUDGE 2: You know they are nervous. You know that they are upset and are asking to go out and talk to somebody, and you are preventing that from happening.

MR. RENICK: I must disagree. We did not [p. 40] prevent it. Sir, the most that can be said about what the District Attorney –

THE COURT: Isn't that a factual issue?

MR. RENICK: No.

THE COURT: Why not?

MR. RENICK: Because we take the facts as Mr. Gabbert himself has laid them out. The undisputed plaintiff's version –

THE COURT: No reasonable jury could come to the conclusion that Mr. Gabbert's client was in any way prevented from consulting with her attorney. Is that what you are saying? That has to be what you are saying.

MR. RENICK: No. What I'm saying is: If it came down to it that given the facts stated by the plaintiff, you cannot say that the District Attorneys made it impossible for her to communicate with her attorney. At best you can say they put them in a mood where they might not have –

THE COURT: But you just told us earlier that that was part of their plan.

MR. RENICK: I'm saying we can assume. Let us assume that.

THE COURT: That's why they (inaudible) –

MR. RENICK: No, not – not – I certainly – [p. 41] if I did, I apologize. I never said that their purpose presumptively was to prevent communication. If anything, it would have been Ms. Baker's being questioned to reveal information that she's reluctant to reveal.

THE COURT: (Inaudible) to disrupt communication? Interfere with communication?

MR. RENICK: I don't think there was any plan. And the facts do not show that there was any attempt to prevent any sort of communication.

THE COURT: Why was it done – why was it done that way, the way it was done?

MR. RENICK: If –

JUDGE 2: It wasn't a plan when they served the search warrant on Gabbert and then milliseconds later order his client in the Grand Jury room? That's not a plan?

MR. RENICK: I'm not saying that's not a plan. The question is: Was the plan to interfere with the ability of the two to communicate or to do something else?

THE COURT: Let me ask you this. In order to state a cause of action, must the plaintiffs prove that that was the subjective intent of these D.A.s and police officers, or must they only prove that it was [p. 42] the practical consequence of doing so?

MR. RENICK: I don't have an immediate answer. But let us assume it's only to show the practical consequences. Again, that is not, in fact, what happened.

What the District Attorneys did here at most was have Mr. Gabbert served with a search warrant in front of his client where he was still accessible. Mr. Gabbert moved himself out of convenience location to his client. Mr. Gabbert refused an opportunity to speak with his client. Those were not things –

JUDGE 2: Would you have stood there if you were Mr. Gabbert to have yourself searched in front of your client?

MR. RENICK: If I believed that my client was so nervous that she needed me there, yes, I would have stripped down to my Skivvies.

JUDGE 2: How could you have talked while they were searching you?

MR. RENICK: I would have asked the nice 80-year-old gentleman to step aside for a moment and let me talk to my client.

JUDGE 2: You think he would have done that?

MR. RENICK: Absolutely.

THE COURT: The Special Master who volunteers [p. 43] to do this kind of work but quite obviously has probably never read the statute?

MR. RENICK: Again, I have to disagree, your Honor, with the characterization that the statute was completely violated. Mr. MacLatchie –

THE COURT: I didn't mean to suggest that every line and text of it was. But, you know, we all know the background history to the adoption of statutes like this in California and other states. And there was reason concern about the use of search warrants to get at privileged information and to impair the attorney-client relationship. That's why we have a Special Master, I assume. That's why the California legislature provided that only the Special Master can search, and no further search may

take place without the object's consent. And clearly both of those were violated.

MR. RENICK: I disagree as to "both of those."

THE COURT: Okay. Which one was not?

MR. RENICK: Both. I believe both were not violated.

As to the first, the statute is very clear that the only objection the target may make to the Special Master is the Special Master's seizure and ultimate disclosure of items. It's Section C, [p. 44] sub 20 –

THE COURT: Let's look at the statute.

"Upon service of the warrant, the Special Master shall inform the party served of the specific items being sought, and that party shall have the opportunity to provide the items requested." Was that done?

MR. RENICK: I believe so, your Honor.

THE COURT: Was Gabbert given an opportunity to produce it?

MR. RENICK: I believe that was the circumstances under which he turned over the two photocopied pages.

THE COURT: "If the party who has been served states that an item or items should not be disclosed, they shall be sealed by the Special Master and taken to the Court for hearing." Did that happen?

MR. RENICK: As far as I'm aware, your Honor, it didn't because it wasn't necessary for it to happen.

THE COURT: Okay.

MR. RENICK: And if –

[p. 45] THE COURT: "The party or his or her designee" – that's, in this case, the County, the police officers and the D.A.s – "shall not participate in the search, nor shall he or she examine any of the items being searched by the Special Master except upon the agreement of the party upon whom the warrant has been served." In this case, that's Gabbert.

That was violated, wasn't it?

MR. RENICK: I disagree, your Honor.

THE COURT: Well, tell me how.

MR. RENICK: Okay. As far as the last one – this is on Page 359 of Volume 2 of the excerpts of records.

The initial search had been completed. They had returned to the empty room. Mr. Gabbert states, "At some point shortly thereafter, Conn comes up. He says, Mr. Oppenheim or the Special Master" –

THE COURT: I can't hear you.

MR. RENICK: I'm sorry.

"At some point shortly thereafter, Conn comes up. He [p. 46] says, Mr. Oppenheim or the Special Master – I forget how he referred to him – has determined that none of the items in your briefcase are privilege; therefore, Detective Zoeller is going to search your briefcase as directed by the judge who issued the search warrant.

"I protested. I asked that it be delayed so that my counsel could appear. I said that if he made a determination that there was nothing privileged in my briefcase, he was correct or in error.

"I – I started" –

THE COURT: I'm waiting for the word "consent." Are we going to hear the –

MR. RENICK: "I started – I started to repeat the procedure that I'd gone through with Oppenheim, and I pulled out the two other files behind – besides Ms. Baker's, and the one file that contained" – (End of Tape 1, Side 1; beginning of Tape 1, Side 2.)

[p. 47] MR. RENICK: – viewed as consent.

Now, whether or not in, you know, quiet hindsight, you know, calm reflection it should have been taken that way, that's a whole nother matter. But Mr. Gabbert was acting in a manner that at least was, you know, conceivably consent.

I'm not going to say that he was, you know, sitting back there and saying, "Oh, sure." But, you know, he also didn't say –

THE COURT: I have a hunch you're going to get a chance to retry this case. And if you want to argue that if front of the jury, be my guest.

MR. RENICK: But, your Honor, if I may –

THE COURT: It will be a disservice to your client if you do. I promise you.

MR. RENICK: Well, I'm left with the factual problems. I'm going to have to feel the best I can.

THE COURT: You're getting paid by the hour.

MR. RENICK: Your Honor, in terms of what you've just said about we're going to get a chance to retry it –

THE COURT: That's just my view. We haven't conferred on this. I think you're going to get a chance to retry it though.

MR. RENICK: The reason why –

[p. 48] THE COURT: Try it on the merits.

MR. RENICK: Well, the concern – not the concern – the comment that I'd make is – even if this court comes to the conclusion that what happened was reprehensible, that it was completely below any standard that we would want of our prosecutors, of our police, of Special Masters, of any of that – the question here is: Do we have a constitutional violation that entitles Mr. Gabbert to proceed on a federal cause of action.

Let us assume that Section 1524 has been, as your Honor said, violated from the get-go, has been – nobody has follow it. There has been an attempt, you know, to get around it. That is at best, if it exists at all, a state law cause of action.

The question of interference between the client and the attorney might create a federal cause of action. But I have to say on the behalf of my two clients, if that happened, and if the court determines that, in fact, that's what they did, they are absolutely immune for that.

They were doing it in the context of their running a grand jury prosecution – grand jury investigation and an ongoing retrial of, as your Honor put it, a highly publicized case.

[p. 49] If we permit –

JUDGE 3: But isn't there an element of good faith in immunity?

MR. RENICK: No.

JUDGE 3: There is not?

MR. RENICK: No. The cases that have dealt with that deal with – there are cases that deal with attorneys in grand jury proceedings who have brought about false testimony and essentially warped the entire grand jury process, which is far from what we have here. And they have been held to be absolutely immune.

There is a court from Judge Goodwin in our brief that talks about the sort of can of worms that you open if you allow attacks on the manner in which prosecutors do their jobs. Which is what the argument – that this was orchestrated, that this was an attempt to interfere with their ability to communicate, that's where we're talking about.

We are saying they didn't prosecute in a manner that we like. Well, any defense attorney –

THE COURT: That's not the allegation in this Complaint. The allegation in this Complaint is that these people acting in concert deliberately disrespected a clear and established constitutional [p. 50] right of Mr. Gabbert, and did so for the purpose of gaining unwarranted

vantage in a serious criminal investigation. That's the allegation.

MR. RENICK: If that's the allegation, that's –

THE COURT: That's an allegation because we're dealing with an appeal from a Motion to Dismiss that we must assume to be true.

MR. RENICK: If your Honor assumes it, the absolute immunity still applies. They were doing it, if they did it, in the context of their jobs as prosecutors, and we might not be happy with their choice to do that. But once we open the door and say you can start questioning any action, however vile we might find it to be, how do we say this vile and no viler?

We're asking that almost any defense attorney be able to say, "Somehow you have interfered with me. I didn't get the Discovery soon enough. I didn't get a chance to interview that witness, you know, at the timing that I wanted. My client was" –

JUDGE 2: That isn't this case.

MR. RENICK: I agree. It's not this case. But that's the matter – that's the situation with absolute immunities. You have to – they have to cover [p. 51] everything.

JUDGE 2: This is basically a case where you have got a client, defense counsel, and you've got the government right in the middle –

MR. RENICK: Well –

JUDGE 2: – blocking. That's this case.

MR. RENICK: Again, I disagree factually that, in fact, they blocked anything. But if the Court isn't going to believe that, then, yes, indeed, that's the situation. But then the absolute immunity as to my two clients should apply.

JUDGE 2: What's the client supposed to think when the client is on the way to the Grand Jury, and the client's lawyer is served with a search warrant and is then isolated from the client?

MR. RENICK: Well, she was going to be isolated from him by the very nature of grand jury proceedings.

JUDGE 2: Sure. But when she walks in, here's her guardian, her counselor, who is sort of reduced to a pretty low status.

MR. RENICK: Maybe that's the exact purpose. That the whole purpose of having her come to testify is to encourage her to reveal the information that they are looking for.

THE COURT: To encourage her to incriminate [p. 52] herself?

MR. RENICK: I honestly don't think that the D.A.s really had much of an interest in Ms. Baker as a criminal target. They wanted –

THE COURT: They told her she was the target of a perjury investigation.

MR. RENICK: Again – and what was – if we think like a prosecutor, what is more likely to make a person –

THE COURT: I used to be a prosecutor. I know.

MR. RENICK: I'm aware, your honor.

THE COURT: I know how to think like one.

MR. RENICK: I apologize.

THE COURT: I would have fired an assistant that did anything like this summarily.

MR. RENICK: Your Honor, I can't question how you would approach this. You were not only a prosecutor, you were in a supervisorial position. And if that's the way, you know, you ran your office, I think that's great because that's what I would agree we'd want out of people. But the reality is that in an adversarial system, which to at least a certain extent the criminal is, you do try and take advantage. Not beyond a line that is prohibited.

[p. 53] JUDGE 2: How about unfair advantage?

MR. RENICK: What is unfair?

THE COURT: I have a feeling we're going to find out.

JUDGE 2: (Inaudible) something there is no reason to. You have all the equipment that you need. You have the police. You have investigators. You have everything at your disposal. Your opponents don't have that.

It doesn't take very much for you to go get a subpoena. It doesn't take very much for you to ask questions. It doesn't take very much for you to have a grand jury where people can't do really very much. They can't assert – unless they assert their rights, and even then you can

take them before a judge. So you strip people practically naked of their rights. You don't have to go any further than that. You have everything going for you.

MR. RENICK: Your Honor, if I agree, that still doesn't change my position. Because then what you're saying – what Judge Hawkins has said is –

JUDGE 2: (Inaudible) all I'm asking you to do.

MR. RENICK: No, but –

JUDGE 2: All I'm asking you to do is what we ask everybody else to do who are lawyers, and who are [p. 54] in law enforce, just do the right thing.

THE COURT: Play by the rules.

JUDGE 3: Set an example.

JUDGE 2: So that's what the rules are.

MR. RENICK: I agree. But that's not our issue here. With all due respect, the solution is to fire them –

JUDGE 3: Well, we wouldn't –

MR. RENICK: – to discipline –

JUDGE 3: We wouldn't – we wouldn't be here if you followed the rules, would we?

JUDGE 2: This would have been over a long time ago.

JUDGE 3: We wouldn't be here.

MR. RENICK: Well, your Honor, with all due respect, we have seen any number of cases that have no business being in the court system, much less having come to appeals.

JUDGE 3: We can't say that about this one.

MR. RENICK: I – I'm beating a dead horse, so I would just – just finish with –

THE COURT: Your red light is also on.

JUDGE 3: Your red light is on.

MR. RENICK: Thank you very much, your Honor.

JUDGE 2: Thank you.

[p. 55] JUDGE 3: We've given you 16 minutes and 50 seconds over.

MR. RENICK: I appreciate it. Thank you very much.

MR. LIGHTFOOT: One comment, Judge Hawkins.

THE COURT: Mr. Lightfoot, don't you do anything to spoil it.

MR. LIGHTFOOT: No, I – a fuller answer to your first question out of the box. Mr. Gabbert was trying his best he could to resist during the time he's being searched. The search of two independent files – as your honor has alluded to – the interview notes of his interview with Ms. Baker, private information about people close to him.

In the Complaint, it indicates that during the course of this time Mr. Oppenheim was trying to copy these materials, and he was resisting that all during this period.

Thank you very much, your Honors.

THE COURT: Matter will stand submitted. And next matter *Smith vs. Oakland Scavenger.*

(End of recording on Tape 1, Side 2)

* * *

[p. 59]

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES ss.

I, DEBRA L. VENTURA, Certified Shorthand Reporter No. 9860, and Deposition Officer for the State of California, do hereby certify;

That the foregoing 55 pages comprise a true and correct account of the audio portion of the subject audiotaped proceeding that was conducted in English, as transcribed by me and reduced to typewriting under my direction and supervision, except in the instances where the transcript indicates "Inaudible."

I hereby certify that I am not interested in the event of the action.

IN WITNESS WHEREOF, I have subscribed my name this 1st day of December, 1998.

/s/ Debra L. Ventura
Certified Shorthand Reporter
in and for the County of Los
Angeles, State of California

APPENDIX C

MANUAL ON GRAND JURY PRACTICE & PROCEDURES

[LOGO]

LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE

GIL GARCETTI
DISTRICT ATTORNEY

July – 1993

* * *

Section 9

APPEARANCE OF GRAND JURY

SUBJECT

The decision whether to invite or subpoena the subject of a Grand Jury inquiry is one which must be made by the prosecutor presenting the case. A suggested letter of invitation is included in Appendix C.

If subpoened, the subject of a Grand Jury inquiry must appear and be sworn. *People v. Conway,* (1974) 42 Cal.App.3d 875; *In re Lemon* (1936) 15 Cal.App.2d 82. However, after being called before the Grand Jury, the subject may assert the privilege against self-incrimination. *Counselman v. Hitchcock* (1892) 142 U.S. 547; *In re Lemon, supra.* If the prosecutor knows that the subject of the inquiry is represented by counsel, defense counsel

should be notified in advance that his or her client has been subpoenaed and will be required to appear before the Grand Jury. Counsel may not be present at the hearing; however, the subject may be excused to consult with counsel as needed before answering questions posed to him or her.

The question of whether and to what extent an admonition should be given to the subject of a Grand Jury inquiry will have to be determined by the prosecutor presenting the case, in consultation with the Grand Jury Advisor.

If a person who is the subject of the Grand Jury hearing invokes his right against self-incrimination, the prosecutor presenting the case should remind the Grand Jury that such assertion should not be considered and is not a basis for the conclusion that the subject must be guilty of a crime or for the return of an indictment.

Section 10

PREPARATION OF "GRAND JURY PACKET"

As directed by the Grand Jury Advisor, the prosecutor shall prepare and deliver to the Grand Jury Advisor a Grand Jury Packet, which includes:

A. a Foreperson's Statement (see Section 16, and APPENDIX D)

B. a tentative witness list,

C. an exhibit list (see Section 18, and APPENDIX E)

D. substantive jury instructions applicable to the charges sought (see Section 28, and APPENDICES F and G), and

E. an outline of the proposed indictment (see APPENDIX H), and

* * *

[TO BE ISSUED ON
DISTRICT ATTORNEY LETTERHEAD]

(DATE)

(NAME)
(ADDRESS)
(CITY, STATE, ZIP)

Dear _____:

On ___[DATE]___, the Los Angeles County Grand Jury will be conducting an investigation into a criminal matter in which you may be involved. The matter under investigation relates to ___[BRIEF DESCRIPTION]___.

On behalf of the District Attorney's Office, I am extending an invitation to you to appear and testify before the Grand Jury in regard to this matter. The letter you are now reading is a letter of invitation only. This is not a subpoena. You are not under any obligation to accept this invitation or to respond to this letter in any way. This invitation is being extended to you so that you will have an opportunity, if you so desire, to offer to the Grand Jury any information which you might have regarding the matter under investigation. You are not being ordered,

compelled, or advised to accept this invitation to appear and testify.

In the event that you decide to accept this invitation and want to testify before the Grand Jury, you may do so by contacting me before [DATE], preferably by telephone, at [NUMBER], or by letter directed to me at the address noted on this letterhead. I can then arrange an exact time for your appearance before the Grand Jury.

Sincerely,
GIL GARCETTI
District Attorney

By

Deputy District Attorney

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff -vs- DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER, and DOES 1 THROUGH X, inclusive, Defendants.	)	No. 94 4227 (RSWL) (ex)

DEPOSITION OF TRACI L. BAKER, taken on behalf of Defendants, at 500 North Temple Street, Suite 648, Los Angeles, California, at 2:30 p.m., Thursday, May 4, 1995, before JENNIE A. ARNOLD, CSR No. 4182, pursuant to Notice.

Reported by: JENNIE A. ARNOLD, CSR No. 4182

Job No. 95-0504JAA

APPEARANCES

For Plaintiff:

LAW OFFICES OF
TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD, ESQ.
13th Floor
655 South Hope Street
Los Angeles, California 90017
(213) 622-4750

For Deponent:

NASATIR, HIRSCH & PODBERESKY
BY: VICKIE I. PODBERESKY, ESQ.
2115 Main Street
Santa Monica, California 90405
(310) 399-3259

For Defendants ELLIOT OPPENHEIM and LESLIE ZOELLER:

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
BY: SCOTT D. MacLATCHIE, ESQ.
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005
(818) 304-7830

For Defendants DAVID CONN and CAROL NAJERA:

DE WITT W. CLINTON
County Counsel
County of Los Angeles
BY: KEVIN C. BRAZILE, ESQ.
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1943

* * *

[p. 20] BY MR. BRAZILE:

Q Do you know where he currently works?

A No.

MS. PODBERESKY: Objection. Relevance.

BY MR. BRAZILE:

Q Do you know what city he resides in at this time?

MS. PODBERESKY: Objection. Relevance. Asked and answered.

THE WITNESS: No.

BY MR. BRAZILE:

Q Do you know what city he works in?

A No.

MS. PODBERESKY: Objection. Relevance.

BY MR. BRAZILE:

Q Do you know the name of anyone who would know his whereabouts?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: At this moment, I do not.

BY MR. BRAZILE:

Q When the search occurred at your residence on or about March 18, 1994, what time did it occur?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: I would estimate between the hours of 6:45 – are you talking about the beginning of when they first arrived at my home?

[p. 21] BY MR. BRAZILE:

Q Exactly.

A Between 6:30 and 7:30.

Q A.M. or P.M.?

A P.M.

Q Who arrived?

MS. PODBERESKY: Objection. Relevance and lack of foundation, if you know these people.

May I have a moment with my client?

(The witness and her counsel confer out of the hearing of the reporter.)

THE WITNESS: District Attorney Conn, District Attorney Najera, Detective Zoeller, and the fourth person, I know, was a representative of the Beverly Hills Police Department, but I don't know his name.

BY MR. BRAZILE:

Q When they came to the residence, did they serve you with a search warrant?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: Yes, they did.

BY MR. BRAZILE:

Q Do you recall what was requested in the search warrant, what they were looking for?

MS. PODBERESKY: Objection. Relevance.

[p. 22] THE WITNESS: I believe it was something to the effect of correspondence and/or legal – I don't recall exactly.

BY MR. BRAZILE:

Q Do you recall if the search warrant asked for correspondence between you and Lyle Menendez?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: I don't recall, specifically.

BY MR. BRAZILE:

Q Do you recall anything that they were looking for, pursuant to the search warrant, on or about or when they actually came out to serve the warrant?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: I know they were searching for things related to Lyle Menendez. I don't know specifically what they were looking for.

BY MR. BRAZILE:

Q Was this a house or an apartment?

A An apartment.

Q When they came to your apartment to execute the search, did you have anything at all belonging to Lyle Menendez in your house?

MS. PODBERESKY: Objection, and advise my client not to answer that question under the Fourth, Fifth and Sixth Amendment rights, the attorney-client privilege and under the appropriate Business and Professions Code and the [p. 23] Disciplinary Rules of the State Bar.

BY MR. BRAZILE:

Q Prior to March 18, 1994, had you given any correspondence between you and Lyle Menendez to your attorney, Mr. Paul Gabbert?

MS. PODBERESKY: I am advising my client not to answer that question under the Fifth Amendment, the Sixth Amendment, the attorney-client privilege and the appropriate Business and Professions Code.

BY MR. BRAZILE:

Q During the search of your home, was anything taken?

MS. PODBERESKY: I am advising my client not to answer that question under the Fourth Amendment.

BY MR. BRAZILE:

Q Do you even know if anything was taken from your home?

MS. PODBERESKY: Go ahead. You can answer.

THE WITNESS: I do know if things were taken from my home.

BY MR. BRAZILE:

Q What was taken from your home?

(The witness's counsel conferred with Plaintiff out of the hearing of the reporter.)

[p. 24] MS. PODBERESKY: I am going to object, Fourth and Fifth Amendments, but I will instruct my client to answer the question.

THE WITNESS: Photographs, magazines, newspapers. I don't recall the other items.

BY MR. BRAZILE:

Q Anything else?

A Letters to Lyle from well-wishers.

Q The letters to Lyle from well-wishers, how did you come into possession of those?

MS. PODBERESKY: Objection. I am instructing my client to assert her Fifth Amendment right and not to answer that question.

BY MR. BRAZILE:

Q How many letters from well-wishers to Lyle did you have in your house on March 18, 1994?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q The photographs that were taken from your home, did any of those photographs depict either you or Lyle Menendez?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q On March 18, 1994, did you have any photographs in your possession of Lyle Menendez?

[p. 25] MS. PODBERESKY: Same objection.

MR. BRAZILE: What's the objection, Counsel, so the record is clear?

MS. PODBERESKY: I'm instructing my client to assert her Fifth Amendment right, and I am also instructing my client not to answer pursuant to the Fourth Amendment.

BY MR. BRAZILE:

Q How long did the search last on March 18, 1994?

MS. PODBERESKY: Objection. Relevance. But she may answer.

THE WITNESS: Approximately an hour and 15 minutes to an hour and 45 minutes.

BY MR. BRAZILE:

Q Was your boyfriend present during the entire time of that search?

A He was inside the residence, although he wasn't present all the time in front of the people doing the search.

Q Does your boyfriend know Lyle Menendez?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: May I have a moment?

(The witness confers with her counsel and the Plaintiff out of the hearing of the reporter.)

MS. PODBERESKY: We're going to need clarification of your question. My client doesn't understand it. Could you

* * *

[p. 28] Menendez?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q To the best of your knowledge, do you know whether or not Justin Frye has ever had any conversations with Lyle Menendez?

MS. PODBERESKY: Same objection.

BY MR. BRAZILE:

Q During the search of your home, did anyone ask you any questions?

A Yes.

Q Who?

A Mr. Conn.

Q What did he ask you?

MS. PODBERESKY: Objection.

MR. GABBERT: Let her answer.

MS. PODBERESKY: I withdraw the objection.

THE WITNESS: He asked me how I was referred to my counsel.

BY MR. BRAZILE:

Q Did you anwer that question?

(The witness's counsel and the Plaintiff confer out of the hearing of the reporter.)

MS. PODBERESKY: Could you repeat the question?

* * *

[p. 32] BY MR. BRAZILE:

Q Prior to the search occurring on your home on March 18th, 1994, did you know there was going to be a search prior to it occurring?

A No.

Q So the first time that you knew there was going to be a search of your home was when they showed up at your home to execute the search; correct?

A Yes.

May I have one moment?

(The witness confers with her counsel out of the hearing of the reporter.)

MS. PODBERESKY: I need to take a recess and speak to Mr. Gabbert and my client.

(A short recess was taken.)

MS. PODBERESKY: Going back on the record.

Miss Baker has to clarify one of her answers to a previous question.

THE WITNESS: I'm a little nervous, and I wasn't thinking. Mr. Zoeller – and I don't know the time frame – came to my home with another person – I think it was a female – at about 8:00 in the morning, two to three weeks prior to the search, maybe. That's an estimate. I don't recall exactly.

[p. 33] BY MR. BRAZILE:

Q What happened when he came to your home on that occasion?

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: He did not tell me the purpose of his visit. He attempted to question me.

BY MR. BRAZILE:

Q What did he ask you?

A I don't specifically recall. I believe it was questions regarding whether or not I knew the Menendezes.

Q What did you say?

MS. PODBERESKY: Objection. I advise my client not to answer under the Fifth Amendment.

MR. BRAZILE: And the Sixth Amendment?

MS. PODBERESKY: Sure. And the Sixth Amendment.

MR. GABBERT: The record should reflect I am still the attorney of record for Miss Baker in the grand jury investigation for which she was a target for perjury investigation which, to my knowledge, is still pending, and the Statute of Limitations has not run.

THE WITNESS: Mr. Zoeller asked me –

MS. PODBERESKY: I'm instructing – is there another question, or did I miss it?

* * *

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER AND DOES 1 THROUGH X, Defendants.	)	No. CV 94 4227 RSWL(Ex)

DEPOSITION OF DAVID P. CONN, taken on behalf of the Plaintiff, at 655 South Hope Street, Los Angeles, California 90017, commencing at 11:20 A.M., Friday, August 4, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

TALCOTT, LIGHTFOOT, VANDEVELDE, WOEHRLE & SADOWSKY
BY: MICHAEL J. LIGHTFOOT
And
MELISSA N. WIDDIFIELD
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS ELLIOT OPPENHEIM AND LESLIE ZOELLER:

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
BY: SCOTT D. MACLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

FOR DEFENDANTS DAVID CONN AND CAROL NAJERA:

KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

* * *

[p. 36] Q All right. At least in Federal Court, "target" is used to describe a person who the prosecutor is trying to determine whether to prosecute for a crime?

A Uh-huh.

Q If that's the definition of "target," was Traci Baker such a target after January, '94?

A Traci Baker was a potential witness but a potential suspect as well.

Q For perjury?

A Right.

Q In the Menendez trial?

A Right.

Q And you become aware at some time – would it have been in February – that she was represented by Paul Gabbert?

MR. BRAZILE: Objection. Vague.

BY MR. LIGHTFOOT:

Q You can answer that.

MR. BRAZILE: If you know if she was represented. I mean, if you have some specific knowledge, but don't guess or speculate. If you don't know, tell him you don't know whether or not she was represented and for what.

THE WITNESS: At some point in connection with the proceedings, we did become aware that she was represented by Gabbert.

* * *

[p. 40] Q It says at the bottom on page 7 – it says it was executed in Los Angeles.

I don't even know. Is Beverly Hills part of Los Angeles?

MR. BRAZILE: It's part of Los Angeles County.

BY MR. LIGHTFOOT:

Q Does that help?

A No. That would only mean that he signed it in Los Angeles.

Q Do you recall him signing it Downtown in your offices?

A I don't think I was present when he signed this. I don't recall being present.

Q Did you have conversations either in February or March with Gabbert about your investigation of his client Traci Baker?

A Right. I did speak to him on the phone.

Q She was served with a Subpoena on March the 17th, Thursday.

Do you remember how many conversations you had with Gabbert about his client before March the 17th?

A No. I don't recall.

Q Do you recall the nature of the conversations?

A All I can say is, I do recall a couple of [p. 41] telephone calls with him in which there was some discussion concerning her cooperation and whether there could potentially be immunity in this case. But I can't say how many phone calls there were.

Q Do you have notes of any of those conversations?

A No. I don't.

Q And when you say "cooperation," were you talking to him about having her cooperate against Lyle Menendez?

A If she would testify truthfully against Eric and Lyle Menendez.

Q So you would bring subornation of perjury charges against them, and she would be a witness for you?

A If that's what the evidence would support, then that was a possibility.

Q And then I gather, at least before this subpoena was served, that you had not reached any agreement with Gabbert about that?

A Correct.

Q Do you have any knowledge whether Zoeller had met with Traci Baker before she was served with a Subpoena on the 17th of March?

A I don't recall what his contact with her consisted of at this time.

• • •

[p. 45] Baker's house?

A Yes.

Q Do you want a little time just to look – you're looking at the probable cause affidavit on the March 18th warrant?

A Right.

Q Why don't you take a minute and read that.

A (Witness complies.)

(Whereupon a discussion was held off the record.)
BY MR. LIGHTFOOT:

Q Have you had an opportunity to read the probable cause affidavit on the March 18 application for the application of the search warrant?

A Yes.

Q Do you have any better recollection now as to how many conversations you had with Mr. Gabbert on

the 18th about his trying to get a continuance of the Grand Jury appearance?

A No. I don't recall.

Q Is it fair to say he was asking for a continuance because he wanted to file a motion in Superior Court to quash the Subpoena because it would compel his client to incriminate herself?

A I forget the reasons he was giving me. I [p. 46] know he wanted to delay. And I told him I wasn't going to delay the proceedings.

Q But do you recall that he told you that he was asking for a continuance because he wanted an opportunity to make a motion to convince the Judge that you were seeking correspondence and that production would be testimonial in nature and run afoul of her 5th Amendment privilege?

A Right.

Q And you did not agree to that continuance?

A Correct.

Q And at the end of the one or more conversations you had with him, was it understood between you and him that the 8:30 A.M. Grand Jury appearance was still in effect?

A Correct.

Q And then it was your decision then to obtain a search warrant for Traci Baker's home?

A Correct.

Q And I gather Zoeller put the affidavit together outside of your presence?

A From what I recall, yes.

Q At some point he got information from you because the last few pages contain information that was in your particular knowledge and not his; is that not [p. 47] correct?

A Correct.

Q Do you recall that conversation today or conversations with Zoeller?

A No. I don't recall it specifically. I know that at some point, I guess I gave it to him or the secretary who typed it up. I don't recall having the conversation itself.

Q The warrant itself indicates that it was issued by Judge Pounders at – this is like the second – the search warrant, the second page of the search warrant – 4:36.

A Uh-huh.

Q Do you have a recollection of having a conversation with Judge Pounders either in person or on the phone about this matter?

A No. I don't.

Q Are you sure you did not have such a conversation?

A I'm sure I did not.

Q Did you then meet with Zoeller some time after the warrant was obtained at 4:36?

A Yes.

Q Did you accompany him down to Orange County to execute the search warrant?

* * *

[p. 78] with Gabbert in your office; is that right?

A Right. So I think that either i saw him – well, I could have seen him at any time that morning. I just don't know. I think definitely by the time Gabbert had left, either I saw him then, or I had seen him earlier that morning.

Q Right.

Were you aware before you got to work that morning that there's a procedure when you search a lawyer or his office that you employ a special master?

A Correct.

Q You knew that before you got to work that morning?

A Correct.

Q Did you at some point decide to use a special master in this case?

A Correct.

Q Did you make that decision to use a special master before you sat down with Mr. Gabbert in your office that morning?

A I don't know if it was before or after. But at some point I realized that we should use a special master.

Q Had you ever used a special master before in executing a search warrant on a lawyer's office or [p. 79] person?

A No.

Q Were you aware of how the procedure operated that morning?

A What do you mean "how the procedure operated"?

Q How you go about getting a special master and what the role of a special master is in the execution of the warrant.

A You just contact someone on the list and find out who's available.

Q Okay.

Were you indicating earlier that if, in fact, you had been able to work out this proffer arrangement, immunity proffer with Mr. Gabbert, you'd have to get approval for the grant of immunity; is that correct?

A Yes.

Q And who, that morning, would you have been required to obtain an approval from in order to get a grant of immunity?

A Officially, it would probably be from an Assistant – one of the Assistant District Attorneys.

Q Have you done that before?

A Yes.

[p. 80] Q And is that how you did it? You went to an Assistant District Attorney?

A Yes.

Q To get immunity, you have to go to a Court and have a Court confer immunity in writing, do you not?

A Ordinarily, that's the best way to do it.

Q And in this instance, you would have gone to Department 100 to get that grant of immunity? That could have been worked out?

A Correct.

Q would you get the approval from the Assistant District Attorney in writing?

A Not necessarily.

Q With respect to the use of a special master, are there any written rules or documents in the D.A.'s office which indicate the procedure to be sued by the District Attorney who's employing the procedure?

A I'm sorry. Can you repeat that.

Q Are there written documents, either rules, regulations or guidelines –

A Right.

Q – that were in existence in the District Attorney's office at that time in March of '94 that the individual department D.A.s would use to determine what procedures to follow?

[p. 81] A Yes. There were.

Q And did you avail yourself of those documents?

A Not that morning. There was no reason to. I'm familiar with the procedure in my office. And I'm familiar with the document. So there was no reason to refer to the documents that morning.

Q When's the last time before March 21, 1994 that you had employed a special master to execute a search warrant of a lawyer's office or person?

A No. I don't know that I have, not personally. I don't know that I have.

Q How was it that you were aware of the procedures on March the 21st if you hadn't done it before?

A Well, I simply knew, whether from the source materials in my office or from word of mouth, that there is a list of special masters and that when we need one, we go to the list and find out who is available and bring them in.

Q You never had occasion, though, to use the list before to look at the list before?

A I seem to recall using a special master in one other case. I'm not sure exactly when that case was though.

Q Do you recall there being a prior occasion [p. 82] when you looked at a list of special masters?

A I don't recall ever looking at a list of special masters myself. Normally, I would just tell my secretary

or someone else to take a look at the list and see who's available.

Q On this occasion, did you, yourself, look at a list?

A No. I don't think I looked at the list.

Q What did you do?

A Probably the secretary, probably Patty looked at the list and made some calls.

Q Do you recall today that you did not look at a list?

A I simply have no recollection of looking at a list. It's possible I looked at the list. I just have no recollection.

Q Was Ms. Najera involved in this effort by you to obtain a search warrant?

A Yes. She was involved in this.

Q She testified yesterday that she had a recollection of looking at a list of individuals.

Does that refresh your recollection?

MR. BRAZILE: Well, Counsel, I don't believe that was her testimony. Unless you have a transcript of it, that's not the way I recall it. So why don't you rephrase [p. 83] the question.

BY MR. LIGHTFOOT:

Q My recollection, Mr. Conn, which could be imprecise, is that Ms. Najera testified yesterday that she did look at a list of individuals who she understood to be a list of special masters that had been provided by the State Bar.

My having said that, does that refresh your recollection as to whether or not you looked at such a list?

A No. It doesn't. Again, she might have looked at it, and Patty might have looked at it, but I don't recall if I did or not.

MR. LIGHTFOOT: That's marked as something.

MS. WIDDIFIELD: Yes. That's marked as Exhibit 1 in the Oppenheim deposition.

BY MR. LIGHTFOOT:

Q This is a document that we received in discovery from your office, Mr. Conn. And it's –

MR. BRAZILE: County Counsel's office.

MR. LIGHTFOOT: I apologize. County Counsel's office.

Q The top page, though, is a memo from Sandra Buttita to Assistant District Attorneys. It's dated June 6, 1994. It's dated a couple months after the incident [p. 84] we're talking about. But it contains a 1, 2, 3, 4, 5, 6, 7, 8 multi-page list of special masters in Los Angeles County.

I'm just going to hand it to you and ask you, does that refresh your recollection as to whether you've seen a list, and is that the list?

A There's no way I could say if it's –

MR. BRAZILE: Let me just go through it. And we'll go through it together.

THE WITNESS: There is no way that I can say if this was the same list that they had at the time or not because, as I said, I don't really recall looking at a list.

BY MR. LIGHTFOOT:

Q So you have no recollection of seeing any list, this one or any other?

A Right.

Q Do you recall at some point that you learned that Elliot Oppenheim would be the special master?

A Well, yes. At some point I heard his name.

Q How did you learn that?

A I don't recall.

Q Did you make the selection of Elliot Oppenheim?

A No. I don't think that I was the one [p. 85] who – I'm not sure who selected him. I'm not sure I was the person.

Q Who do you recall making that selection?

A I don't recall how the process was. I don't recall who made the selection. I just know that somehow we got a hold of a special master.

Q And that morning as the process was ongoing, did you know Elliot Oppenheim?

MR. BRAZILE: Personally or had he ever met him before?

BY MR. LIGHTFOOT:

Q Ever hear the name? Ever met him?

A Yes. I had seen him before.

Q Where had you seen him before?

A I don't know. I don't know where I've seen him before. Whether it was in court or somewhere else, I don't know. But I think I have seen him before.

Q Did you recognize the name Elliot Oppenheim when you first heard it in your office?

MR. BRAZILE: On March 21st?

MR. LIGHTFOOT: Yeah.

THE WITNESS: I don't recall that I knew.

BY MR. LIGHTFOOT:

Q- All right.

But you're clear that you did not make the [p. 86] selection of Elliot Oppenheim off the list yourself?

A Right. I'm sure I didn't.

Q You have no recollection who did that?

A No.

Q Was Mr. Zoeller now up in your offices, your office itself, and the secretary's area at this time as you're preparing the search warrant?

A Was he where?

Q Was he in your office or in the general area of your office?

A I don't know where he was. He was working with Patty, I'm sure, in putting together the warrant. So I'm sure he was in the area.

Q Did you draft that portion of the probable cause affidavit which was added to the existing affidavit?

A Could I see that.

Q Sure.

I don't want to interrupt you, but I'm talking about that portion of the affidavit that begins on page 7, line 15 and proceeds to the end of the affidavit.

A Right. Yeah.

I can't recall who actually used this language, whether this was that paragraph which begins on line 15 or – something that Les Zoeller drafted or I drafted, I don't know.

* * *

[p. 115] Grand Jury room.

Q You had not read the provisions of 1524 that morning, as I recall your testimony?

A Correct.

Q Were you aware of the requirements and procedures that Mr. Oppenheim had to follow as a special master?

A What specifically are you referring to?

Q Well, are you aware today that there are certain requirements that are placed on a master at the time he begins to execute the warrant and during the execution of the warrant?

A I haven't looked at the provisions lately.

Q Were you aware of those provisions on the morning of March the 21st?

MR. BRAZILE: The question is vague and ambiguous as to "aware of those provisions."

Do you mean that they existed, the specifics, in the entire section?

MR. LIGHTFOOT: No. In his mind on the morning of March 21, 1995.

Q Were you, Mr. Conn, aware that there were particular requirements that were placed on a special master by Section 1524 before and during the execution of a warrant under that section?

[p. 116] A I don't know what special requirements you're referring to.

Q Were you aware of any special requirements?

A As I said, I've read 1524 in the past. I cannot tell you right now what's contained in 1524.

> Q Let me just read from Section 1524 (c)(1). "At the time of the issuance of the warrant the court shall appoint a special master in accordance with subdivision (d) to accompany the person who will serve the warrant. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested."

On the morning of March the 21st, were you aware that it was the duty of the special master to inform the party that he had an opportunity to provide the items requested?

MR. BRAZILE: Objection. It's irrelevant and [p. 117] immaterial to this case because the search of Mr.

Gabbert has already been declared legal. But I'll allow the witness to answer the question as to what his knowledge was of 1524 at that time.

If you have knowledge or if you don't know, you can tell him that.

THE WITNESS: I didn't recall the specific provisions of 1524 that morning.

BY MR. LIGHTFOOT:

Q Did you hear Mr. Oppenheim advise Mr. Gabbert to that effect?

A I don't recall a conversation between Mr. Oppenheim and Mr. Gabbert.

Q And you didn't so advise Mr. Gabbert of that provision, I gather?

A No. I did not advise him at all.

Q And you didn't hear Ms. Najera advise him of that?

A No.

Q Were you aware that under Section 1524 that if the subject of the search warrant objected to the disclosure of documents, that the items were to be sealed and brought to a court?

MR. BRAZILE: Objection. Irrelevant and immaterial. That search of Mr. Gabbert has already been [p. 118] declared legal and dismissed as part of the claims in this action. However, I'll allow the witness to answer the question as to his knowledge.

And keep it in mind that you were not the special master.

THE WITNESS: Right.

As I said, I was not – I did not think to the specific provisions of 1524 that morning.

BY MR. LIGHTFOOT:

Q So you didn't hear Mr. Gabbert advised of that provision in 1524 yourself by anyone – is that correct? – that morning?

A Correct.

Q And you didn't advise him of that yourself?

A Correct.

Q And to the best of your knowledge, no one provided Mr. Oppenheim with an envelope in which to seal any documents before he began the execution of the warrant; is that correct?

MR. BRAZILE: Objection. Lack of foundation. Calls for speculation and conjecture on the part of this witness. But he can answer the question.

THE WITNESS: As I said, no. I'm not aware of anyone giving him an envelope.

* * *

[p. 135] Q But that Return indicates that no property was seized.

Is that still your best recollection that no property was seized?

A My recollection is that I did not see anything taken from Mr. Gabbert.

Q Now, you recall that at some point later in the morning – by the way, do you know Mr. Richard Hirsch?

A Yes.

Q You met Mr. Richard Hirsch?

A Yes.

Q And when you met him, you understood that he was there as Mr. Gabbert's attorney; is that correct?

A Yes. I guess you can say "as his attorney."

Q At the point where you came out of the Grand Jury and listened to Mr. Oppenheim and after listening to Mr. Oppenheim, did you direct Mr. Zoeller to search the briefcase of Mr. Gabbert?

A I remember I was involved in that conversation. I didn't direct him. I indicated – I believe I indicated to Mr. Gabbert at that point that the investigating officer would take a look at the briefcase now.

Q And you understood that to be a search?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,

Plaintiff,

vs.

DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER AND DOES 1 through X,

Defendants.

No. CV 94 4227 RSWL(Ex)

DEPOSITION OF PATTIJO FAIRBANKS,

taken on behalf of the Plaintiff, at 655 South Hope Street, 13th Floor, Los Angeles, California 90017, commencing at 2:05 P.M., Thursday, August 10, 1995, pursuant to notice, before Jo Ann C. Iwamasa, CSR 7557, RPR.

APPEARANCES:

FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE, WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
655 South Hope Street, 13th Floor
Los Angeles, California 90017

FOR DEFENDANTS DAVID CONN AND CAROL NAJERA:

KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

FOR DEFENDANTS ELLIOT OPPENHEIM AND LESLIE OPPENHEIM:

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
BY: SCOTT D. MAC LATCHIE
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005

* * *

[p. 10] A I just really don't recall.

Q When did you start working in the district attorney's office?

A 1978.

Q Did you do anything else between your property management and –

A Actually, correct that. 1979. I became employed by L.A. County in 1978.

Q Where did you initially work for L.A. County in 1978?

A Department of Social Services.

Q What did you do for them?

A I was secretary to a director.

Q Did you do anything else between your property management and starting at Department of Social Services?

A No.

Q Where were you first assigned?

A Consumer Protection Division.

Q Where was this located?

A 320 West Temple Street.

Q What was your job there?

A Initially, senior legal secretary. Ultimately, senior office assistant to the head deputy.

Q And how long did you have that position as [p. 11] senior office assistant?

A Actually, in consumer, about seven years.

Q Were you transferred to another division?

A Yes.

Q And I take it that would have been 1986. Is that correct?

A You'd have to look at my personnel records.

Q Where were you transferred to?

A Organized Crime Division.

Q What was your title then?

A Again, you'd have to look at my personnel records. It's changed over the years due to upgrades in positions, but basically, it's the same thing, a version of what I am today, and that's senior legal assistant.

Q What do those duties entail, or what did those duties entail in the Organized Crime Division?

A Just basically the senior legal assistant for the division. They're varied. It borders on paralegal type of assignments.

Q Can you give me an example of what some of those duties are?

A In the Organized Crime Division, I was assigned to help prosecute the – help the prosecutors on the Cotton Club case.

Q Did you work for Mr. Conn?

[p. 12] A Yes, I did.

Q When you say "help the prosecutor," did you function as support staff?

A Yes. I coordinate witnesses. I do anything that they need done as far as assistance.

Q Did you help prepare search warrants?

A No. Well, I did not write them.

Q Would you type them out for law enforcement?

A I have been known to type search warrants, yes.

Q And in Organized Crime, did you work for more than one deputy?

A At the point that I was assigned to Organized Crime, I more or less worked according to cases, not according to deputies.

Q Did you work more for one deputy than another?

A Yes.

Q Did you work more for Mr. Conn than other deputies?

A No.

Q Who did you work for?

A Dale Davidson.

Q How long were you in the Organized Crime [p. 13] Division?

A I don't recall. The division underwent name changes. I went to Career Criminal for a while. I went back to work to Organized Crime which became Special Crimes which became Major Crimes but – well, no. Strike Major Crimes.

While in Special Trials, I should say, I was put on Special Assignment and remained there.

Q What was the special assignment?

A The Simpson prosecution team.

Q When were you assigned to the Simpson prosecution team?

A June 12, 1994.

Q Okay. So what would your title have been in March of 1993?

A It's –

MR. MAC LATCHIE: '94.

BY MS. WIDDIFIELD:

Q '94. Excuse me.

A Same as it is now. Senior legal – quite frankly, I'm not sure what the legal term is. I think it's senior legal office support assistant.

MR. BRAZILE: That's close enough.

BY MS. WIDDIFIELD:

Q What was the title of the division you were [p. 14] working in at that time?

A Special Trials or Special Crimes. Special Trials.

Q Okay. How many attorneys were in Special Trials at that time?

A I don't know.

Q Was there more support staff than just you at that time in Special Trials?

A Yes. I think I supervised, too.

Q You supervised, too. Okay.

And I take it Mr. Conn was in Special Trials at that time?

A Yes.

Q And I take it you worked closely with Mr. Conn?

A No.

Q No?

A No closer than anyone else.

Q Just briefly, if you could give me sort of a rundown on what you do during the day or what you did during the day in March of '94 in the Special Trials in your position at that time.

A I have no consistent duties. Depending on who's in trial doing what case for different deputies, I do different things.

* * *

[p. 26] the grand jury or was scheduled to testify before the grand jury on that Monday?

A I don't recall.

Q Did Mr. Conn request your assistance in the grand jury process for that next Monday morning?

A I have no specific recollection at all.

Q When you came to work on that Monday morning, do you recall having any awareness that you were going to be working with Mr. Conn or Ms. Najera in the grand jury?

A If a grand jury was scheduled, yes, I'm sure I was aware of it, but I don't recall it.

Q Do you recall the first time that you saw David Conn on March 21st?

A No.

Q Do you recall going to the grand jury on March 21st?

A Going -

Q To the grand jury area.

A Physically walking down there?

Q Yes.

A No.

Q Did you, in fact, go down to the grand jury area?

A Yes.

* * *

[p. 29] Q Do you recall seeing any of those people up in the office, in the district attorney's office, that morning?

A I don't have any specific recollection.

Q Were you requested to type any documents by Mr. Conn that morning before you went to the grand jury area?

A I don't have any specific recollection.

Q Didn't he ask you to type an immunity letter for Ms. Baker?

A Not that I recall.

Q Before going down to the grand jury area that morning, did you assist in the preparation of a search warrant?

A I may have. I don't recall.

Q In fact, you helped Detective Zoeller prepare a search warrant application, didn't you?

MR. BRAZILE: Objection. Assumes facts not in evidence and misstates the testimony of the witness and there's a lack of foundation.

If that's true, you can answer, but if that's not true, don't adopt the answer she's posed in the question.

THE WITNESS: I don't recall.

[p. 30] BY MS. WIDDIFIELD:

Q Did you see Detective Zoeller in the district attorney's offices that morning before you went to the grand jury area?

A If he was there, I'm sure I saw him, but no specific recollection.

Q You have no recollection of assisting in the preparation of a search warrant application that morning?

MR. BRAZILE: Objection. The question has been asked and answered by the witness. She said she did not recall.

Do you want her to answer it again?

MS. WIDDIFIELD: Uh-huh.

THE WITNESS: I don't recall.

BY MS. WIDDIFIELD:

Q Were you requested, at some point that morning, to locate a special master?

A Yes.

Q And do you understand what a special master is?

A Yes.

Q Can you tell me what your understanding of what a special master is?

A Someone appointed by the Court to oversee

* * *

[p. 42] A Not specifically.

Q Generally do you recall?

A (No audible response.)

Q Do you recall seeing them again that day?

MR. BRAZILE: After Traci Baker –

BY MS. WIDDIFIELD:

Q After she knocked on the door.

A I have to say I'm sure I did, but I don't recall it.

Q Do you recall anything else that happened that morning?

A No.

Q Okay. Did Ms. Baker come specifically to you and say, "I need to speak to my lawyer"?

A I – I don't recall the specifics of that.

Q Do you recall if anybody else said that to you?

A It may have been conveyed to me through a bailiff.

Q Was it in the ordinary course of your duties to be the intermediary between the client –

A Yes. Finish the question. I'm sorry.

Q Have there been other occasions where you have been in the grand jury area assisting a district attorney investigating a case where the witness [p. 43] testifying before the grand jury has needed to speak to his or her attorney?

A Certainly.

Q Have they been allowed to do so?

A Oh, sure.

Q And so it's your understanding when a witness asks to speak to his attorney, that the witness be allowed to do so?

A Absolutely.

Q Where were you positioned in the grand jury area that morning?

MR. BRAZILE: At what point in time?

BY MS. WIDDIFIELD:

Q From the time you got there to the time you left, where were you?

A I am in many places there. So it's – at any specific time, I cannot tell you where I was or might have been.

Q Okay. Do you have any sense of how long you were in the grand jury area that morning?

A No, I don't.

Q Was it more than an hour?

A I have no idea.

Q Do you recall, at some point, David Conn and Carol Najera coming out of the grand jury room with

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X, Defendants.	)	No. CV 94-4227 RSWL (Ex)

Deposition of PAUL L. GABBERT, taken on behalf of Defendants, at 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, commencing at 1:10 P.M. on Tuesday, the 4th day of April, 1995, before ELIZABETH A. HINES, CSR No. 9236, pursuant to Notice.

Reported by: ELIZABETH A. HINES,
csr No. 9236

Job No.: 95-0404EAH

APPEARANCES

For Plaintiff:

TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKI
BY: MICHAEL J. LIGHTFOOT, ESQ.
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

For Defendants David Conn and Carol Najera:

DE WITT W. CLINTON, COUNTY COUNSEL
BY: KEVIN C. BRAZILE
PRINCIPAL DEPUTY COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

For Defendants Elliot Oppenheim and Leslie Zoeller:
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
BY: SPENCER C. FRIEGER, ESQ.
225 South Lake Avenue
Penthouse
Pasadena, California 91101

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[p. 24] Fifth, Sixth Amendments and the attorney-client privilege.

Q. BY MR. BRAZILE: At any time from February 11th, 1994 to March 21st, 1994, did you have any telephone conversations with David Conn?

A. Yes.

Q. On how many occasions?

A. I don't recall.

Q. More than one?

A. Yes.

Q. More than five?

A. I'm not sure.

Q. When was the first time that you spoke with Mr. Conn from the time period of February 11th, 1994 to March 21st, 1994 by telephone?

A. I don't recall.

Q. What did you discuss with him during the first conversation?

A. The only thing I recall discussing with him during my first conversation was that I was representing the witness, Tracy Baker.

Q. Did you tell him anything else?

A. I may have.

Q. Do you remember anything else you told him?

A. I don't remember at this time.

Q. When is the next time you had a telephone

• • •

[p. 27] with Carol Najera during that period of time?

A. I don't recall.

Q. Was it in February or March?

A. I don't recall.

Your question was from March 11th. Did you mean March 11th or February 11th?

Q. I meant February 11th.

A. All right. The answer would be the same. I talked to Ms. Najera on the telephone on at least one occasion. The occasion I remember the date of was March 17, 1994.

Q. And what did you discuss with her?

A. The fact that Mr. Zoeller – I didn't really discuss things with her. She told me some things.

Q. What did she tell you?

A. She said Mr. Zoeller would be late for the 1:00 o'clock appointment.

Q. What 1:00 o'clock appointment was she referring to?

A. Well, there was no 1:00 o'clock appointment. Mr. Zoeller was to appear at my office, serve Ms. Baker with a grand jury subpoena pursuant to my prior arrangement with, I believe, Mr. Conn, at noon, on Thursday, March 17th.

Q. Did Mr. Zoeller appear and serve a subpoena on [p. 28] that particular day at 1:00 o'clock?

A. No.

Q. Why not? Do you know?

A. Well, he appeared ~~and didn't appear~~ [but not /s/ PLG] at 1:00 o'clock.

Q. What time did he get there?

A. He got there sometime – my recollection is around 2:00 or 2:15.

Q. To your office?

A. Yes, sir.

Q. Where was Ms. Baker at that time?

A. At the time he arrived?

Q. Yes. Was she at your office or somewhere else?

A. At my office in – at my office building in my office when he arrived.

Q. What happened when Mr. Zoeller arrived?

A. The receptionist told me that Mr. Zoeller had arrived. I went out and greeted Mr. Zoeller. I invited him into my office. I believe he said hello to Ms. Baker.

Q. Was she in your office at that time – Ms. Baker?

A. Yes.

He served her with the subpoena. He stated or uttered some words with respect to wanting her cooperation.

* * *

[p. 86] damages that he is now claiming as a result of this lawsuit. I don't see – this is not a verified ~~client~~ [complaint /s/ PLG]. He didn't sign the complaint. Therefore, I'm entitled to know what he is claiming as his damages, his general damages that are claimed.

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: Well, to amplify ~~in~~ [on /s/ PLG] paragraph 59 of the complaint, where I believe the question is answered, on the day in question, I suffered the violation of my constitutional right to practice my profession. The execution of the warrant shocked, surprised, angered me. It was an affront to my dignity.

Q. BY MR. BRAZILE: The execution of the warrant; correct?

A. Yes. It made me the target of a search in a criminal proceeding. It upset me. It outraged me. It impaired my ability to confer with and rationally advise my client.

With respect to the subject matter of my representation, it divided my interest between my sense of privacy, which was being invaded, and the personal security of my own pe~~rson and~~ my effects. Divided me between my personal concerns of obtaining counsel for myself, thinking [p. 87] about what the special master was doing as he ran roughshod over the Penal Code, among other things, and my duty to my client.

And it interfered and impaired my state of mind. It upset me. It affected my reputation because the search warrant was a public record. There were articles published in the LOS ANGELES TIMES, the LOS ANGELES DAILY JOURNAL and the METROPOLITAN NEWS, which put me in an unfavorable light as the subject of a search regarding evidence in a notorious murder prosecution. This affected not only my reputation in the community at large, but within the legal profession as well as within my practice of criminal law.

Office personnel at the building where I practice were made aware of this. My secretary knew about this. Numerous lawyers knew about this. At least one of my neighbors knew about this. But for the privacy that attaches in legal proceedings, I was in the general sense defamed. My privacy was invaded because I was associated with criminal activity in an unfavorable light.

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: I was particularly surprised and outraged by the misrepresentations that were made to me by [p. 88] a fellow member of the bar, Mr. Conn, who lied to me about the immunity agreement.

In my experience in practicing criminal defense for a number of years – and I have advised ~~numerous counsels with~~ [/s/ PLG] numerous clients before grand juries – I find that a grand jury hearing is inherently stressful for the client. The client is always nervous.

In this particular situation, the client was a target of a perjury investigation and had been asked to bring documents, the production of which tended to incriminate. [her /s/ PLG]. Immunity had been refused prior to that date. And now the lawyer who was supposed to be her champion and advocated to protect her before that tribunal was being searched and literally carried away.

This impaired the relationship of special trust and confidence that inures in the attorney-client relationship because she was looking at me and I'm being searched. How am I going to protect her? How can she really rely on my advice if this is being done to me? She is a layperson.

Those are the ways in which I was damaged that day and since then, and those are the ways in which my relationship with my client was interfered with, impaired and damaged.

Q. Well, first off, when she was before the grand

* * *

[p. 95] we can submit responses in writing to that effect as well.

MR. BRAZILE: All right.

Q. Now, you are also alleging damage to your reputation; correct?

A. Yes.

Q. Now, do you base that upon the search or the fact that you couldn't have access to your client?

A. I base it upon what took place during that day. My relationship with the client, what was depicted in the search warrant and the articles that were on the subject by various newspapers, as well as the dissemination of the information that occurred that day throughout the legal community of Los Angeles County.

Q. As a result of your claim of not being able to practice your profession, that particular right, what damages are you seeking?

MR. LIGHTFOOT: Asked and answered. I object to that.

MR. BRAZILE: Are you instructing him not to answer?

MR. LIGHTFOOT: I am.

MR. BRAZILE: Now, I'll go back to my last area, and I'll turn it over.

Q. Earlier I asked you the question regarding did Tracy Baker ever tell you that while she was testifying before the grand jury she was denied the opportunity to

* * *

[p. 100] impatience in my ~~mis~~[/s/ PLG]representation of Ms. Baker, who he was now in the process of taking in front of a duty judge to be held in contempt.

Q. You did not feel it was important to speak to him or even mention the fact that you had not been allowed to speak to your client?

A. I thought lots of things were important, but this was not my first duty of business in that the point it –

Q. You didn't give any kind of insight into the fact that his secretary had mentioned anything to you while you were in the first search?

A. Not to my recollection, sir.

Q. Approximately how far away was David Conn's secretary when she made that statement?

A. I think she was at the door to a secretarial space or an office space. I guess she was about ten feet away.

Q. Did Mr. Oppenheim say anything to David Conn's secretary after she made her statement?

A. Not to my – not to my recollection.

Q. Did he make any kind of expression to the best of your knowledge?

A. Other than Mr. Oppenheim's gratuitous comments about various dress sizes ~~on~~ [in /s/ PLG] my personal calendar, he [p. 101] seemed to be very concerned to move the search along, and he wanted to copy my attorney-client [/s/ PLG] privileged notes with Ms. Baker.

I don't recall him saying anything to a secretary.

Q. Did he say anything to you regarding the fact that your client allegedly wanted to speak to you?

A. I don't think so. He kept reading the search warrant and then going back to my items. I don't think he said anything about that.

Q. You mentioned that – you testified earlier that you had a brief discussion with Mr. Oppenheim after the second search; is that correct?

A. I had a discussion with him. I believe it was outside of Department 110, yes.

Q. And you testified that he had said that the documents he reviewed were not privileged because there was no stamp of "confidential" on those documents?

A. Yeah. I don't think he said, "no stamp of confidential." Or he said, "no stamp on it [that it /s/ PLG] was privileged."

Q. Is that the first time he made that statement?

A. It was the only time he made the statement.

Q. So throughout the first search, he didn't indicate anything about a stamp of confidentiality?

[p. 102] A. Correct.

Q. During that first search, what were your statements regarding the confidentiality regarding the documents?

A. What were my statements?

Q. Yes.

A. "This is a client's file. It's, again, privileged attorney-client communications. Are you still going to search this?"

"Yes."

"This is a client's file. It's got attorney-client privilege. Are you still going to search this file?

"Yes."

"This is Ms. Baker's file. This has some notes of my interviews with her. Are you still going to search this?"

"Yes." Where he proceeded to read and read it read and asked me if he could copy it. This not in any sequence. I don't know which filing we are dealing with first. But – and I'm sure I made similar comments with respect to items in my calendar, items on a yellow legal tablet that contained clients' names and information about the clients.

And his response was, "move it on. I still [p. 103] want to look at it."

Q. Did you take the time to tell him why you believed those clients were privileged?

A. Yeah, I told him they were my clients, and they were my clients' files, and they contained privileged communications. And he didn't bat an eye.

Q. Did you tell him anything other than the fact that it contained privileged information?

A. Other than with respect to Ms. Baker's files, no.

Q. Did you ask him why he believed those files were not privileged

A. Other than outside of 110, no.

Q. So during the course of the – now you had testified that that search took 20 minutes. So during that 20 minutes, you didn't ask him, again, why he believed those files were not confidential; is that correct?

A. He never said he didn't believe they were confidential. I told him they were confidential and privileged. He ignored and searched them anyway.

There was no point in going any further with Mr. Oppenheim.

Q. So throughout the course of the 20 minutes, is it your testimony that he ignored you?

A. He ignored the assertions of privilege on

* * *

APPENDIX H

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES I through X, Defendants.	)	No. CV 94 4227 RSWL (Ex)

DEPOSITION OF CAROL NAJERA,

taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:32 a.m., Thursday, August 3, 1995, pursuant to Notice, before Barbara Walsh, CSR #4134, RPR.

APPEARANCES:

FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE (not present)
655 South Hope Street, Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS DAVID CONN
and CAROL NAJERA:

COUNTY OF LOS ANGELES
DE WITT W. CLINTON, County Counsel
BY: KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

FOR DEFENDANTS ELLIOT OPPENHEIM
and LESLIE ZOELLER:

FRANSCELL, STRICKLAND, ROBERTS
& LAWRENCE
BY: SCOTT D. MacLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

* * *

[p. 47] warrant?

A She wanted to know if she could leave and go out and get Chinese food.

Q Did you understand her to be represented by counsel at the time?

MR. MacLATCHIE: Objection. Vague.

THE WITNESS: She may have been.

BY MS. WIDDIFIELD:

Q Did you have any awareness whether Paul Gabbert represented her at the time?

MR. MacLATCHIE: Same objection.

(Mr. Lightfoot reenters deposition room.)

MR. BRAZILE: If you know, you can answer.

BY MS. WIDDIFIELD:

Q Don't speculate. Give me your best estimate.

A I think I knew but I'm not sure. I don't remember if I knew. I think I knew.

Q So you think you knew she was represented by Mr. Gabbert at that time?

A I think. But I couldn't swear to it.

Q While you were in her home, did she at any time say that she wanted to speak to her lawyer?

A Yes.

Q Do you recall when she said that?

A No.

* * *

[p. 50] A I don't know.

Q Did you – when I say "you," I mean you collectively: Mr. Conn, Detective Zoeller and the other officers – did you find what the search warrant was seeking at Ms. Baker's house?

A We found some of what we believed – some items we believed were covered by the search warrant, yes.

Q What items were there?

A You have to refer to the attorney service –

Q Let me ask you this question. Did you feel you still needed additional information from Ms. Baker after leaving the house?

MR. BRAZILE: Objection. Attorney work product and government privileged information. The witness is instructed not to answer.

BY MS. WIDDIFIELD:

Q At the time of the search, was it your understanding that Ms. Baker was still supposed to appear before the Grand Jury on Monday, March 21?

A I believe she was.

Q Do you recall whether Mr. Gabbert ever sought to have her appearance delayed at any point?

A I remember hearing something about a delay, but I couldn't tell you when.

Q Who did you hear that from?

* * *

[p. 94] Q Did he say anything to you?

A Not to me.

Q Did he say anything to Mr. Conn?

A Yes.

Q What did he say?

A They had a discussion.

Q Did you overhear the discussion?

A Yes.

Q What was said during this discussion?

A Mr. Oppenheim said that there was nothing privileged in any of the documents that he examined.

Q Did Mr. Conn ask him what the basis for his decision was?

A I believe he may have. But I don't recall the response.

Q What did Mr. Conn then do?

A I don't recall what Mr. Conn did.

Q What did you do?

A I was standing there. And then –

Q Had Mr. Oppenheim seized any document from Mr. Gabbert?

A I think so.

Q Do you recall what that document was?

A I think it was a letter that Traci Baker had. It may have been all of it.

[p. 95] Q What did Mr. Oppenheim do?

A I don't know if he seized it or he had the bailiff seize it.

Q But it was that morning?

A I believe it was that morning. Or it might have been Mr. Gabbert pulled it out. I don't remember.

Q Where did that letter end up?

A It's in evidence, I believe. On the return.

Q Wasn't it on the return of the search warrant or shouldn't it have been?

A Yes.

Q The document that either Detective Zoeller or Mr. Oppenheim received from Mr. Gabbert, that was in fact the document that both the Grand Jury subpoena and the search warrant sought, wasn't it?

A Not technically.

Q That's what you were looking for, wasn't it? A letter from Lyle Menendez to Traci Baker?

A That's what we were looking for, but that's not what we got.

Q I thought you just stated that's what you got.

MR. BRAZILE: Well, objection –

BY MS. WIDDIFIELD:

Q What else were you looking for if that wasn't it?

A The rest of the letter.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff,	)	
vs.	)	No. CV 94 4227
DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER AND DOES 1 THROUGH X, Defendants.	)	RSWL(Ex)

DEPOSITION OF ELLIOT OPPENHEIM, taken on behalf of the Plaintiff, at 1215 Beverly Estate Terrace, Beverly Hills, California 90210, commencing at 1:47 P.M., Friday, June 30, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

TALCOTT, LIGHTFOOT, VANDEVELDE, WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS ELLIOT OPPENHEIM AND LESLIE ZOELLER:

FRANSCELL, STRICKLAND, ROBERTS
& LAWRENCE
BY: SCOTT D. MACLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

FOR DEFENDANTS DAVID CONN AND CAROL NAJERA:

KEVIN C. BRAZILE
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

ALSO PRESENT: LESLIE ZOELLER

* * *

[p. 14] Q Prior to March 21, 1994, how many searches did you conduct as a special master?

A I can only remember one at this point in time.

Q One other than the medical malpractice –

A Uh-huh. No. That's the only one I can remember.

Q So the only one you can remember is the one about 10 years ago relating to a medical malpractice case?

A Yes.

Q Do you recall, Mr. Oppenheim – and I know this was a while ago. But since it's the only case we have to work with at the moment, I'm going to try to probe your memory on this case.

A Pardon me for interrupting.

I have a glimmer of memory with – the State Highway Patrol went with me on a raid on a Russian immigrant's office on Fairfax. They took measurements of all the rooms, photographs.

Q Do you recall when this was?

A Do I recall what?

Q When this occurred?

A A number of years ago.

Q Would it be five years ago?

A Or more.

[p. 15] Q Or more.

Was this a doctor's office or –

A Yes. It was a woman, a Russian woman doctor's office.

Q I'm going to go back to the first instance you described 10 years ago of the medical malpractice case.

Aside from the pamphlet that you have described that you received in the mail, were you given any other instructions before going out to the doctor's office to conduct the search?

A No.

Q At the doctor's office, do you recall if the doctor was present when you conducted the search?

A Yes.

Q Do you recall the doctor at any time telling you that certain of his files were privileged?

A This was a woman doctor.

Q The first one was a woman doctor as well?

A It's just a woman doctor. That's it.

Q Then I may be confused.

A You are.

Q I thought that there were two cases that – two different instances when you acted as a special master.

[p. 16] A Let me understand which one you're talking about now.

Q I'm going back to the first one 8, 10 years ago, a doctor's office –

A Okay.

Q – was that a woman doctor?

A No.

Q That's the one we're talking about.

That doctor – do you recall that doctor – and I take it it was a he –

A Uh-huh.

Q – did he say to you at any time "These files are privileged"?

A No. Quite the opposite. He said look at whatever you want to look at.

Q Were there any documents taken from that doctor's office that were sealed?

A No. Not to my recollection.

Q Were there any documents that the doctor requested be sealed?

A No.

Q Let's go now to the second case you referred to with the woman doctor in which you accompanied the State Highway Patrol.

In the course of that search, was the [p. 17] doctor present?

A Yes.

Q And did the doctor say to you that these are my privileged files?

A No.

Q Did she at any time request that any of the files be sealed?

A No.

Q Prior to March 21, 1994, based on your reading of the pamphlet and based on whatever other information you might have had, what did you understand your role as a special master to be when going into a doctor's office or attorney's office to conduct a search?

A For one thing, to advise the person what his – rights were.

Q And what did you understand those rights to be?

A That they could remain silent. Basically whatever the Miranda rights are, although I did not recite them.

Q Is there anything else you recall as being your role?

A Huh-uh. No.

Don't shake your head.

THE REPORTER: Yes.

[p. 18] BY MS. WIDDIFIELD:

Q What did you understand that you were supposed to do once you went into, in these cases, a doctor's office?

A I thought I'd answered that.

Q Well, perhaps I didn't get a full answer. And if you could answer that again for me, I would appreciate it.

A To generally inform the person of his rights and that they did not have to disclose any information that might result in their being charged with a crime. Basically that was it.

Q What else were you then supposed to do after you advised them, the doctor, attorney, of their rights?

A I can't recall.

Q Were you supposed to go in and search the premises pursuant to a warrant?

A No.

Q In the two instances in which you acted as a special master, were you advised by law enforcement on what to do once you got to the premises?

A I don't recall that I was.

Q Let's take just one instance. Let's refer to the Highway Patrol search. I will call it that for [p. 19] shorthand where you referred to the female doctor.

When you got to the doctor's office and after you advised the doctor of her rights, what did you then do?

A Nothing that I recall.

Q Did you go through the doctor's files?

A I don't recall.

Q Do you recall doing anything at the doctor's office?

MR. MACLATCHIE: Other than advising.

THE WITNESS: I probably did.

BY MS. WIDDIFIELD:

Q But you don't recall what?

A No.

Q The pamphlet that you received – I guess it would be in approximately 1985 or 1987 from the State Bar, prior to becoming a special master – with reference to that document, did you receive any updates of that pamphlet at any time, at any later point in time?

A No.

Q That was the only document you received from the State Bar regarding the procedures of a special master?

A Yes.

Q I would like to have the reporter mark

* * *

[p. 35] file; is that correct?

A No.

Q You glanced at his accordion file?

A Pardon?

Q You glanced at his accordion file?

A Right.

Q How were you able to glance at his accordion file?

A My eyes were open.

Q Did you ask him if you could look at his files?

A I have no recollection. I had a search warrant issued by Judge Pounders which he complained about. And I said, "Take it up with Judge Pounders."

Q Do you recall what Mr. Gabbert's complaint was?

A I'm not sure of this. But it might have been that he had things in his briefcase that were confidential, his own notes, for example.

Q So he told you that he had confidential material in his belongings; is that correct?

A Read that back. How did I answer that? Isn't that what I just said?

(Record read.)

[p. 36] BY MS. WIDDIFIELD:

Q Did you seal those notes when he told you that they were confidential?

A Did I see them?

Q Seal them.

A Seal them, no.

Q Why didn't you seal them?

MR. MACLATCHIE: Objection. Argumentative.

MR. BRAZILE: Also irrelevant. The search has already been declared lawful.

BY MS. WIDDIFIELD:

Q Mr. Oppenheim, I would like to direct your attention to the exhibit in front of you. If you could turn the page, please.

A Special Master Guidebook.

Q Correct.

A Turn what page?

Q I would like to turn to page 2, please.

A 2?

Q That's correct.

A (Witness complies.) Okay.

Q Actually, what I would like you to do is go to page 7.

A Are you sure?

Q I'm sure.

* * *

APPENDIX J

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER AND DOES 1 THROUGH X, Defendants.	)	No. CV 94 4227 RSWL(Ex)

DEPOSITION OF LESLIE ZOELLER, taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:21 A.M., Tuesday, August 1, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

APPEARANCES:

FOR PLAINTIFF PAUL L. GABBERT:

TALCOTT, LIGHTFOOT, VANDEVELDE, WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

FOR DEFENDANTS ELLIOT OPPENHEIM AND LESLIE ZOELLER:

FRANSCELL, STRICKLAND, ROBERTS
& LAWRENCE
BY: SCOTT D. MACLATCHIE
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005

FOR DEFENDANTS DAVID CONN AND CAROL NAJERA:

ROGER H. GRANBO
Senior Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

* * *

[p. 71] A I don't recall. Generally, Mr. Conn and Ms. Najera were together during the conversations that I had with them.

Q So it was on the speaker phone?

A Not necessarily, no.

Q Your understanding is that she would be present in the room with Mr. Conn?

A Yes.

Q I take it you, in fact, did obtain a search warrant for Ms. Baker's residence?

A Yes.

Q And when did you serve that search warrant?

A On the 18th of March.

Q At what time?

A I don't recall. It was in the evening of the 18th, somewhere around 7:30, I believe.

Q Who else was there to serve the search warrant?

A My partner Detective Steve Miller, David Conn and Carol Najera.

Q Is Steve a man or a woman?

A A man.

MS. WIDDIFIELD: Just off the record for one second.

[p. 72] (Whereupon a recess was taken.)

BY MS. WIDDIFIELD:

Q When we left off, we just had arrived at Traci Baker's house to serve the search warrant on March 18th.

A That's correct.

Q And can you describe for me what happened when you arrived at Ms. Baker's house?

A We knocked on the door.

Q And when you say "we," is it all four of you – Conn, Najera –

A We were all at the door. I don't know who knocked on the door. I believe I did.

She answered the door. And I served the search warrant. I gave her – gave her a copy showing her the original or vice versa. But she ended up with the copy of the search warrant.

Upon reading the search warrant, she made a statement, "I shouldn't tell you this, but all the things that you're looking for are with my attorney."

Q How did this statement come about?

Did she just read the search warrant and spontaneously state that to you?

A That's correct.

Q Did she at any time say that she wanted her

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[p. 75] Q Did Ms. Najera participate in the search?

A Yes.

Q Did Officer Miller participate in the search?

A Yes.

Q How long did the search take?

A Approximately an hour.

Q And what were you looking for?

A I was looking for correspondence between Traci Baker and Lyle Menendez.

Q Did you find any documents that were responsive to the search warrant?

A Directly, no.

Q And did you seize any documents?

A Yes.

Q If there weren't any documents responsive to the search warrant, why did you seize a document?

MR. GRANBO: Objection. Misstates –

MR. MACLATCHIE: Objection. Argumentative.

MR. GRANBO: Well –

BY MS. WIDDIFIELD:

Q You can answer the question.

MR. GRANBO: It also misstates his testimony.

BY MS. WIDDIFIELD:

Q I believe you stated there weren't any [p. 76] documents directly related to the search warrant; is that correct?

A Directly responsive, that's correct.

Q Can you tell me what you mean by "indirectly responsive" then.

A Indirectly responsive was articles pertaining to the Menendez case and information pertaining to the Menendez case.

Q Did you understand Ms. Baker to be represented by counsel at the time that you searched her residence on March 18th?

MR. MACLATCHIE: Objection. Vague and ambiguous. Lacks foundation. It's also irrelevant.

Instruct the witness not to answer.

BY MS. WIDDIFIELD:

Q At any time during the course of this search warrant search of Ms. Baker's residence on March 18th, did she state that she wanted to contact her attorney?

MR. MACLATCHIE: Same objection. Same instruction since the last time you asked that question.

BY MS. WIDDIFIELD:

Q Did she, in fact, attempt to contact her attorney?

MR. MACLATCHIE: Same objection. Same [p. 77] instruction.

BY MS. WIDDIFIELD:

Q This may be asked and answered. I apologize if I have.

Did you have any conversations with Ms. Baker while you were conducting this search?

A Yes.

Q And can you describe the substance of those conversations for me?

MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q Did Ms. Baker have any conversation with Mr. Conn that you overheard?

A Yes.

Q And can you describe the nature of that conversation?

MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q Did you overhear Ms. Baker speak to Ms. Najera?

A Yes.

Q And can you relate the substance of that conversation?

[p. 78] MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q Did you overhear any conversations between Ms. Baker and Officer Miller?

A Yes.

Q Can you relate the nature of that conversation?

MR. MACLATCHIE: Same objection. Same instruction.

BY MS. WIDDIFIELD:

Q When you say that you did not locate any document directly responsive to the search warrant, can you describe for me what would have been "directly responsive" to the search warrant?

A Yes.

Exactly what is described in the search warrant.

Q And that would be?

A Correspondence between Lyle and Traci Baker.

May I add something?

Q Surely.

A Also within a search warrant, you have to show that the person has control of the location that you're intending to search. So a search warrant commonly

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